THE WHITE HOUSE

WASHINGTON

January 20, 2001

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Standards of Official Conduct

Everyone who enters into public service for the United States has a duty to the American people to maintain the highest standards of integrity in Government. I ask you to ensure that all personnel within your departments and agencies are familiar with, and faithfully observe, applicable ethics laws and regulations, including the following general principles from the Standards of Ethical Conduct for Employees of the Executive Branch:

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by applicable law or regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

(5) Employees shall put forth honest effort in the performance of their duties.

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

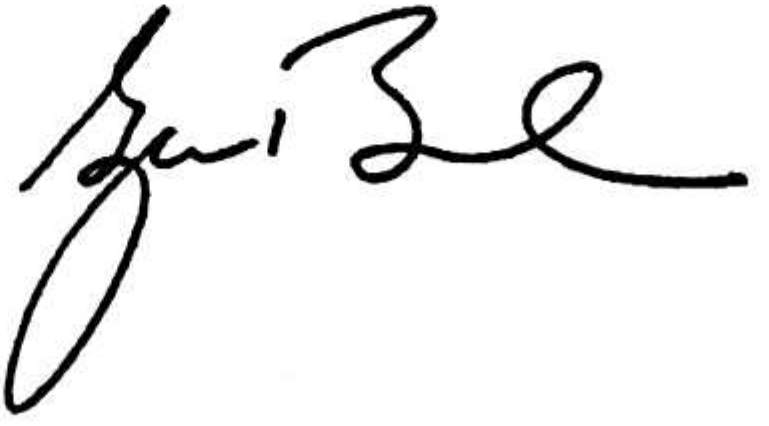
(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those -- such as Federal, State, or local taxes -- that are imposed by law.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating applicable law or the ethical standards in applicable regulations.

Executive branch employees should also be fully aware that their post-employment activities with respect to lobbying and other forms of representation will be bound by the restrictions of 18 U.S.C. 207.

Please thank the personnel of your departments and agencies for their commitment to maintain the highest standards of integrity in Government as we serve the American people.



**January 22, 2001**

**Memo from: Secretary of the Treasury Paul H. O'Neill**
**To: President George W. Bush**

**RE: Tax Policy**

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

January 22, 2001

SECRETARY OF THE TREASURY

MEMORANDUM FOR THE PRESIDENT

FROM: Paul H. O'Neill

SUBJECT: Tax Reform

I believe there is an opportunity to get quick action on your tax proposal if we move now.

You have won the general argument on the desirability of a tax cut and the opposition has been cornered into arguing over how large the cut should be, and, their numbers are moving toward your numbers and scope.

I also believe there is a reasonable majority for acting on death taxes, the marriage penalty and the child credit. In fact, there is some sentiment in the Congress to act on these and then add on individual Members' ideas for so-called targeted tax cuts, such as ethanol incentives and tax credits for "fix up" investments in inner city housing. The argument advanced is that this is a way to get a quick victory in the tax arena. The problem with this approach is that it leaves behind the single most important element of your plan – action on the reductions in marginal rates and creates the possibility of an ugly Christmas tree tax bill you would feel constrained to veto. Not a great beginning.

The growing agreement, even alarm in some quarters, with regard to the slowing economy, gives you what could be a great opportunity to get very fast action on taxes, featuring marginal rate reductions.

If we could get your tax proposal in front of the committees in the next few weeks, we could argue that the only thing that keeps us from taking out an insurance policy against the slowing economy turning into a recession is expedited action by the Congress.

This approach keeps us out of the morass of arguing about the theology of economics and simply says "we don't care about theology, we care about taking practical action right now." Since we all agree there should be a tax cut, let's act by March 15th with a marginal rate cut retroactive to January 1, so we can adjust withholding tables and have an immediate reduction in tax collections that benefits all Americans.

The only Congressional argument against expedited action is that it doesn't fit their process. If, or as, the economy continues to slow, not many members will be thrilled to go home and tell their constituents it is going to take them six months or more to act. Incidentally, we know that the real economy has slowed and the official statistics

will reflect the slowing over the next quarter, at least. If the current slowness starts moving toward re-acceleration late in the second quarter it would weaken the argument for quick action.

I don't see any hazard for you in this approach. If Congress acts quickly and there is substantial re-acceleration, for whatever reason, the Fed can raise rates to cool the economy if the upside gets out of hand. This would be a happy circumstance.

If they fail to act quickly and we do slip into a recession, the Congress gets all the blame.

I believe we have a great case for rate reductions and yet I found in my conversations with individual members and in my confirmation hearings there is almost no understanding of how your proposals would benefit low and middle income Americans. And, in the media reports of what I said there was not a single mention of the huge reductions in rates you have proposed for four person families with incomes of $35,000, $50,000 and $75,000. This is a powerfull point and, by repetition, we need to force the media to report it.

With a well-designed effort we can get this argument on our ground and stop the drum beat about a tax cut for the rich.

In order to stay within your total tax reduction numbers and provide early implementation for marginal rate cuts we will have to stretch out implementation of some of the other initiatives. We should argue that we will revisit implementation dates for the other features, if the economy permits us to do so.

As the days go by, our ability to use the approach I am suggesting will wane, because the opposition will say we put the lie to the argument for early action by our slowness in making a proposal.

Accordingly, I recommend that we get the other appropriate members of your team to react quickly so your options are not reduced by the passage of time.

cc: Vice President Cheney
Larry Lindsey

Prepared by Secretary O'Neill

VCC original to WH

JK cc to Tim Adams

Please log and file

1/22/01

**January 24, 2001**

**Letter from: Goldman Sachs CEO Hank Paulson**
**TO: Energy Secretary Spencer Abraham**

**RE: California Energy Crisis- Natural Gas Sale Order**

**Includes Handwritten note from Paulson to Secretary of the Treasury Paul O'Neill, "Paul, This is hardly the new administration's finest hour! -- Hank"**

The Goldman Sachs Group, Inc. | 85 Broad Street | New York, New York 10004
Tel: 212-902-5904

Henry M. Paulson, Jr.
Chairman
Chief Executive Officer

Goldman Sachs

January 24, 2001

The Honorable Spencer Abraham
Secretary of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

BY HAND

Re: Temporary Emergency Natural Gas Purchase and Sale Order dated as of January 19, 2001, Supplemental Emergency Natural Gas Purchase and Sale Order dated as of January 22, 2001, and Further Temporary Emergency Natural Gas Purchase and Sale Order dated as of January 23, 2001

Dear Mr. Secretary:

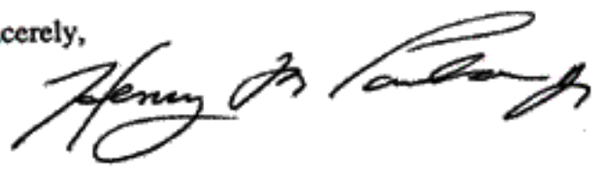
We remain stunned and disappointed by the captioned Orders. They are both unfair and have no basis in law. The Orders in effect require our shareholders to purchase natural gas and provide it to Pacific, Gas & Electric (PG&E) with no prospect of being paid.

There is no scarcity or shortage of natural gas in California or any region of the United States. Nor is there any national defense emergency or any other basis in law to justify this extraordinary and unprecedented action. PG&E's current situation is solely the result of its own management choices and the regulatory scheme that the State of California has created and continues to apply.

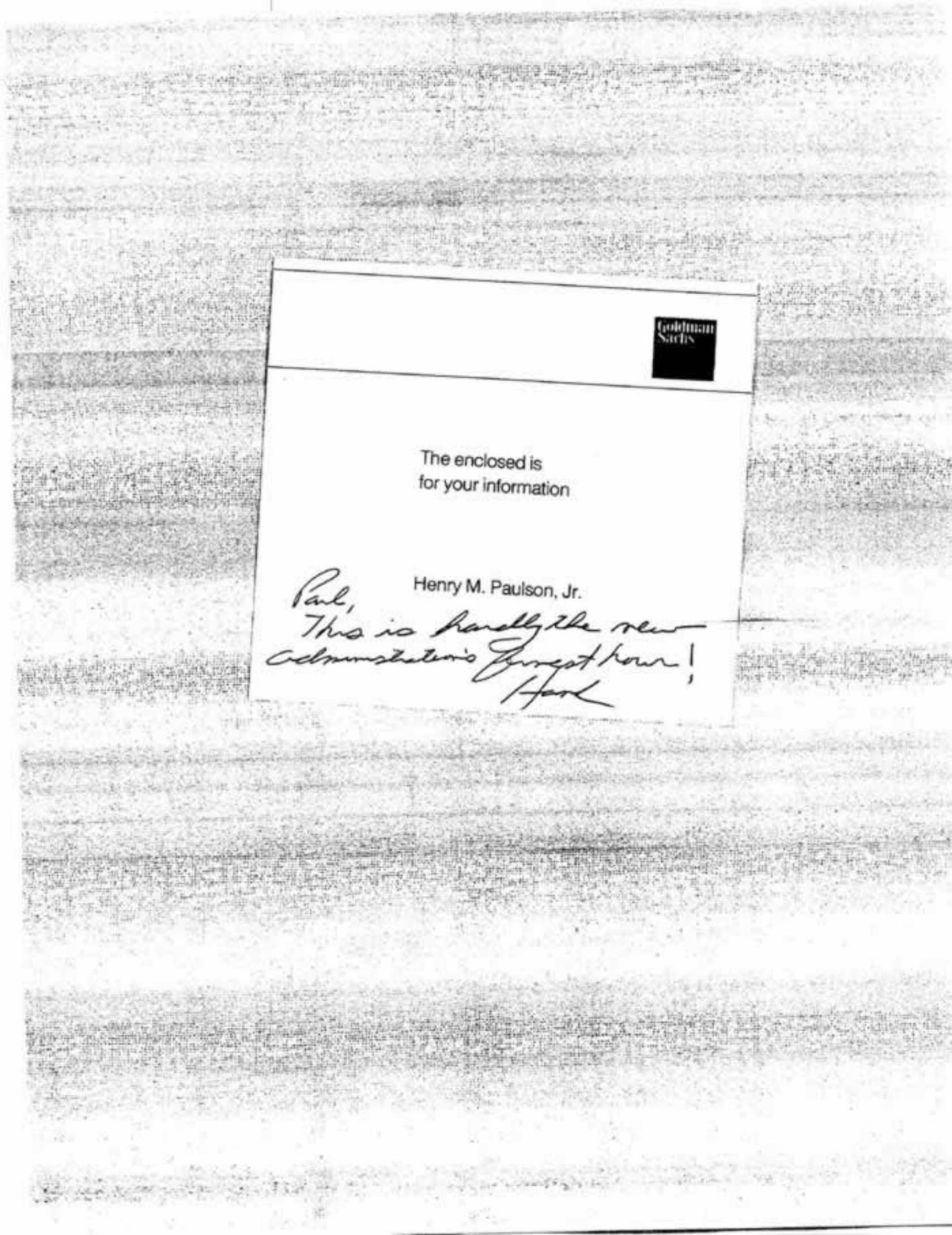
No additional gas supplies are being created by these Orders. Neither we nor our subsidiary J. Aron and Company (J. Aron) are natural gas producers. The effect of the Orders is to require J. Aron to enter the gas markets, to purchase gas and to supply it to PG&E without compensation. This purely "financial" issue is entirely within the capacity of the State of California and PG&E to solve. The former, in particular, certainly has the financial capacity to fund or guarantee gas purchases should it so choose.

The Orders should be reconsidered and immediately rescinded. They set a very dangerous precedent. It is entirely appropriate for PG&E, its customers, or the State of California to pay for the gas used in that State. And it is unfair, unlawful and unconstitutional for you to require that this cost be borne by others. The Federal government will be accountable for all injury that we suffer as a result of the Orders.

Sincerely,



bcc: The Honorable Paul O'Neill


Goldman Sachs
The enclosed is
for your information
Henry M. Paulson, Jr.
Paul,
This is hardly the new
administration's finest hour!
Hank

**January 25, 2001**

**Memorandum from National Economic Chairman Larry Lindsey**
**To: White House Chief of staff, Andrew Card**

**Re: Treasury's Department's Office of Tax Analysis**

**Handwritten note in margin by Secretary o the Treasury Paul O'Neill: "Larry: This is bureaucratic chicken----. You must have something better to do with your time than send me memos such as this one."**

THE WHITE HOUSE
WASHINGTON

Larry: This is bureaucratic chicken---- you must have something better to do with your time than send me memos such as this one.
Paul O'Neill

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: LARRY LINDSEY

SUBJECT: TAX NUMBERS

CC: SECRETARY O'NEILL
DIRECTOR DANIELS

DATE: JANUARY 25, 2001

You should be aware that the Department of Treasury's Office of Tax Analysis has informed us that they are unable to provide the revenue cost of the President's tax reform program before the beginning of next week. This makes it impossible to provide the President with timely answers to his questions using OTA numbers. As a consequence, the decisions the President will be making on Monday regarding tax and budget matters will not be based wholly on Administration estimates. Instead, they will represent an amalgam of Treasury baseline assumptions and revenue costs estimated by the Joint Committee on Taxation. This will make it impossible to know for sure which tax options fit within the budget.

I personally find this situation deplorable. I am puzzled that the OTA did not have a model of the President's tax proposal in an operable condition so that it could be combined with the latest economic assumptions. This must mean that not only was one not written since it was determined that the President would take office, but that none was written during the campaign either. As you know, the President has been steadfast in sticking to his tax proposal since he proposed it in early December, 1999.

I hope that some thought would be given to improving the Administration's turnaround time capabilities as tax and budget negotiations are likely to depend on them.

cc: C.O.S.
Daniels.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

# Fax

To: See Below
From: Secretary O'Neill

Fax:
Date: 1/26/01

Phone:
Pages: 2 w/Cover

Re:
CC:

☑ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

•Comments:

Lindsey Lindsey
Mitch Daniels
Andrew Card

Sender's Fax # (202) 622-0073


********** -COMM. JOURNAL- ********** DATE JAN-26-2001 ***** TIME 11:50 *** P.01

MODE = MEMORY TRANSMISSION START=JAN-26 11:46 END=JAN-26 11:50

FILE NO.= 174

| NO. | COM | ABBR/NUM | STATION NAME/ TELEPHONE NO. | PAGES | PRG.NO. | PROGRAM NAME |
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-EXEC. SEC. TREASURY DEPT-

********** 202 622 0073- ***** - **********

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

# Fax

To: See Below
From: Secretary O'Neill

Fax:
Date: 1/26/01

Phone:
Pages: 2 w/Cover

Re:
CC:

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•Comments:

Larry Lindsey
Mitch Daniels
Andrew Card

**Sender's Fax # (202) 622-0073**

********** -COMM.JOURNAL- ********** DATE JAN-26-2001 ***** TIME 11:48 *** P.01

MODE = MEMORY TRANSMISSION START=JAN-26 11:48 END=JAN-26 11:48

FILE NO.= 177

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| 001 | OK | # | 94560127 | 002/002 | | |

-DEC. SEC. TREASURY DEPT-

********** -202 622 0073- ********** - ***** - ********** - **********

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

# Fax

To: See Below
From: Secretary O'Neill

Fax:
Date: 1/26/01

Phone:
Pages: 2 w/cover

Re:
CC:

☑ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

•Comments:

Larry Lindsey
Mitch Daniels
Andrew Card

**Sender's Fax # (202) 622-0073**


********** -COMM.JOURNAL- ********** DATE JAN-26-2001 ***** TIME 11:46 *** P.01

MODE = MEMORY TRANSMISSION START=JAN-26 11:45 END=JAN-26 11:46

FILE NO.= 173

NO. COM ABBR/NUM STATION NAME/TELEPHONE NO. PAGES PRG.NO. PROGRAM NAME

001 OK # 9395388 002/002

-EXEC. SEC. TREASURY DEPT-

********** 202 622 0073- ***** - - **********

**February 1, 2001**

**Secretary of the Treasury Paul O'Neill's daybook**

**Includes: National Security Council Agenda for a White House Situation Room meeting on U.S. policy in the Persian Gulf**

SECRETARY O'NEILL'S DAYBOOK FOR THURSDAY, FEBRUARY 1, 2001

1. CONG. ISTOOK 2404 RAYBURN HOB
2. SEN. CAMPBELL 380 RUSSELL SOB
3. LINNETTE DEILY
4. NSC GULF POLICY MEETING, SITUATION ROOM

**DEPARTMENT OF THE TREASURY**
**WASHINGTON, D.C. 20220**

MEMORANDUM FOR SECRETARY O'NEILL

Through: Chris Smith
Senior Advisor to the Secretary

From: Arthur Cameron
Deputy Assistant Secretary
Legislative Affairs and Public Liaison

Subject: Meeting with Ernest Istook, Chairman, Subcommittee on Treasury, Postal Service, and General Government Appropriations, January 30, 2001, 3:00 PM

**Background:**

You are scheduled to meet with Chairman Istook with regards to the timing of your hearing on the Treasury Department's appropriations for Fiscal Year 2002. The desired outcome is to postpone your hearing until after the administration's Fiscal Year 2002 budget has been sent to the Congress and each of the Bureau Heads has testified about their respective budgets. We would suggest that you testify last because this would allow you to focus on the major Departmental appropriations priorities and not those of the individual Bureaus. This will also delay your hearing until a time when the Administration's tax plan is better formulated and allow you to avoid a hearing solely on a tax plan that is still in the developmental stages. This meeting will also serve as a "meet and greet" with the Chairman.

The Treasury Department's relationship with the Subcommittee, under the leadership of former Chairman Kolbe, was always cordial and professional. We anticipate that this strong relationship will continue under the leadership of Chairman Istook.

Mr. Istook represents the 5th District of Oklahoma, which covers the northern central parts of Oklahoma, including portions of Oklahoma City and it's suburbs. Congressional Quarterly's Politics in America characterizes Mr. Istook, "as an ally of the conservatives and a subcommittee Chairman on the ultimate insider panel, Appropriations, Istook skillfully straddles the line that divides ideological firebrands and legislative pragmatists in the House GOP." For example, "In 1997, Istook was a vocal opponent of letting members have a scheduled cost of living adjustment (COLA) to increase their pay, and he [Istook] tried to force the leadership to schedule a floor vote on the issue. But when Gingrich greased the skids for the COLA to go through, Istook said he wouldn't try to force a vote." (CQ Politics in America) It is this reputation, as a legislative pragmatist, that we believe will serve the Treasury Department well in our working relationship with the Chairman.

The Clerk and professional staff of the Subcommittee, which essentially is the same staff as during the 106th Congress, has already provided the Chairman with a significant amount of

information with regards to the operations and budgets of the Treasury Department. The Chairman is known to be a prolific reader, and thus, while he is still new to the Subcommittee you can expect that he will know quite a bit about the Treasury Department. He still is digesting a lot of the information however, and his positions on appropriate funding and planned areas of oversight are unlikely to be fully developed.

Michele Mrdeza has been the Clerk of the Treasury Postal Subcommittee since the Republicans gained control of the House in 1995. She is a former member of Senator Domenici's Staff on the Senate Budget Committee and is well versed on all aspects of the budget and appropriations process. Ms. Mrdeza is a very big supporter of the Treasury Department and has a better understanding of our core missions than most employees of the Treasury Department. She is known to have an excellent relationship with Mr. Young, Chairman of the full Committee, and is often able to take care of issues herself which are normally only solvable with direct member intervention. The reason that we have provided you with information regarding the Clerk is that her support is crucial for Treasury if we wish to meet our funding objectives.

**Analysis:**

Chairman Istook is likely to be well versed on how the budget process is going to work this year from his staff. However, because this is an election year, or "abnormal" budget process, and because this is your first time through this process for the Treasury Department and his as Chairman of the Treasury Postal Subcommittee, this is likely to be a topic of discussion. (You should be aware that Mr. Istook was the Chairman of the District of Columbia Appropriations Subcommittee during the 106th Congress.) Additionally, the timing of this year's budget process is one of the major reasons why we believe that your hearing should be postponed until after the budget has been released. An overview of the budget process that OMB has outlined for agencies for Fiscal Year 2002 is as follows:

> January 31st—OMB will release guidance/assumptions ("Passback") to all Departments and Agencies. This will be based on an OMB process, not a Departmental request process, and will provide a resource ceiling for FY 2002 for discretionary budget authority, include recommendations on the absorption of none, some, or all of the pertinent campaign initiatives, and suggestions of possible offsets.
>
> Mid February—President will transmit his Budget Blueprint to the Congress which will include agency totals and functional totals but not "account-by-account" detail.
>
> Early March—OMB will finalize account-by-account distributions within Departments and Agencies via the OMB MAX database process. After this, agencies will begin preparing budget/performance plan justifications for Congress.
>
> First week of April—President's budget scheduled to be released. This timing coincides with the week prior to the three-week Spring recess.

In conversations with Subcommittee staff they have indicated that Bureau hearings may not start until after Budget has been released, however this has not been finalized. In past years the Bureaus have had their hearings prior to the Secretary's hearing. This enabled Departmental staff to identify issues of interest to the Committee, identify potential areas of questioning, and to

identify issues which may require the Secretary's personal attention to highlight in his testimony. From the Committee's perspective this allowed the members to identify issues which they held a particular interest in.

In addition, in your confirmation hearing before the Senate Finance Committee on January 17, 2001, you stated that the administration's tax plan would be sent to the Congress in approximately six weeks. This would put the plan being forwarded to the Hill in the early March timeframe. We would recommend that until this plan has been fully developed that we minimize the opportunity for members to question you on this subject in an open hearing.

It is for the above reasons that we would recommend that you propose to Chairman Istook that you not only testify before the Subcommittee after the budget has been released in April, but also after the Bureaus have testified. Subcommittee staff has indicated that they believe that this is the best course to follow and we believe that if you personally request that this be the procedure for this year's hearings the Chairman will agree.

Attachments (3):

Talking Points for Meeting with Chairman Istook
Summary of FY 2002 Budget Request
Biography of Chairman Istook

## Talking Points for Meeting with Chairman Istook

- I understand that your Committee has been supportive of Treasury's efforts to improve operations and meet continuing challenges in tax administration, law enforcement, and the many other Treasury core missions.

- I look forward to working with the Committee to balance Treasury's key programs against an environment of limited resources.

- This year's budget process is a bit different, but we will be working closely with the Committee on meeting Treasury and Committee goals within this broader process.

- I look forward to testifying before the Committee this year and understand that you are now in the process of determining your hearing schedule. I was hoping that you would be willing to accommodate my request to testify after the various Treasury Bureaus once the President's budget is submitted to the Congress. I believe this will allow me to focus on the issues of most importance to the Committee during my hearing and will make the session more productive for both the Treasury Department and the Committee.

- I would like to emphasize that I would like to have an open line of communication with this Committee. If you ever have an issue, no matter how small, with the Treasury Department you should always feel free to bring it up with me personally.

- Lastly, I would like to hear about some of the thoughts and concerns you may have about the Treasury Department so that I can focus on these as we work through the 2002 appropriations process.

# SUMMARY OF FY 2002 BUDGET REQUEST

## FY 2002 - A UNIQUE BUDGET REQUEST PROCESS

- Typical with the transition to a new administration, the **budget request process is delayed and condensed,** with the submission delayed from February to April.

- In addition, this year's FY 2002 process is **slightly unique** from prior change in Administrations:

  (1) Although Treasury provided an estimate of the Department's costs to maintain current services to OMB in November 2000, **OMB applied an automatic calculation method** (5.5% for pay and 2.0% for non-pay categories) to all Federal government agencies' FY 2001 financial plans **to estimate** each agency's **FY 2002 baseline requirements.**

  (2) **Instead of the traditional OMB budget process** to review, prioritize and approve agencies' requested FY 2002 initiatives, the Administration is undertaking a broad review of the overall budget and will be giving guidance to Agencies shortly.

  (3) In **late-February**, the **President will transmit his Blueprint and FY 2002 Budget Outline** to the Congress. This Blueprint will **become the basis for developing the complete**, detailed FY 2002 President's Budget **request** to Congress **scheduled for** submission in **early April.**

## RECAP OF FUNDING

- **FY 2001 - Enacted Appropriations: $13.997 Billion**

- **FY 2002** - January 16th **OMB Baseline Submission: 14.611 Billion** (excludes FY 2002 new initiative requests)

## FUNDING ISSUES

**(1) Maintaining Current Services**

- Maintaining our current program levels will be an important objective in the near term and in FY 2002 – we will be working with the Committee on meeting these needs.

**(2) Programmatic Issues** - We will be addressing in this process additional program needs of important needs that continue to face the Department

- **IRS Reform and Restructure Implementation** - Continued support for Organizational Modernization (modernization and reform remain top priority for Treasury) and staffing investments to restore, stabilize and strengthen tax compliance and customer service programs

- **ATF Firearms Enforcement** -- Continued support against youth crime and for other firearms enforcement programs.

- **Customs Modernization** - In FY 2001, the Department made great progress in receiving funding critical to the modernization of Customs' trade processes. This investment is crucial to the vitality of Customs' mission.

- **Secret Service Protection Efforts** - Support to address workload and staff retention issues for the Service.

- **Money Laundering** - Continued support for the Money Laundering strategy jointly implemented between Treasury and Justice

- **Counter-Terrorism** - Continued support for Treasury bureaus' participation with the Joint Counter-Terrorism Task Force.

- **Office of Foreign Assets Control** (Departmental Offices) - Support for counter-terrorism efforts and for the Foreign Narcotics Kingpin Designation Act mandating a global sanctions program targeting foreign narcotics traffickers and organizations.



# Rep. Ernest Istook (R)

## Elected 1992; 4th term

**In Washington:** An ally of Christian conservatives and a subcommittee chairman on the ultimate insider panel, Appropriations, Istook skillfully straddles the line that divides ideological firebrands and legislative pragmatists in the House GOP.

On issues such as abortion and school prayer, Istook, a Mormon, is a passionate and persistent proponent of policies espoused by the most conservative elements of the Republican Party. He helped found the Conservative Action Team (known as the CATs), a caucus of members on the GOP's right wing that is devoted to restraining government spending and regulation and promoting a conservative ideal of family and social life. Instead of using his Appropriations seat to secure funds for his district — the traditional tack — Istook has concentrated most of his efforts on blocking spending that he views as unnecessary, or on trying to attach conservative policy language to appropriations bills. Such endeavors have often made Istook a thorn in the side of the GOP leadership.

But he seems to have a sense of just how far he can press his case without earning a reputation as an unreasonable pest. Istook (IZ-took) came to Congress with an understanding of the legislative process; he covered the Oklahoma Legislature as a reporter and served six years in the state House. So while he does try to tug GOP leaders to the right, he realizes that they also face pressures from moderate Republicans and the Clinton administration.

Heading into the 106th Congress, Istook said that he and his staunchly conservative allies expected to be allowed votes on their priorities, but he acknowledged that their positions might not prevail. "What many of us want is to make sure we have the opportunity to address these important issues," he said. "The expectation should be an opportunity rather than a guarantee of success."

At one point in the 105th, he observed that in the ranks of the House GOP, "There are definitely fights going on for the heart and soul of the Republican Party. It's the constant battle between principle and necessity. Everyone reconciles those in different ways."

During Newt Gingrich's tenure as Speaker, Istook often bucked the party line on budget and spending bills, protesting what he saw as the leadership's caving in to White House demands for additional federal expenditures.

But in the summer of 1997, when a cadre of conservatives unhappy with Gingrich maneuvered to oust him as Speaker, it was not Istook but two other Oklahoma Republicans — Tom Coburn and Steve Largent — who gained attention as coup-plotters. "You have 20 Republicans unhappy with the Speaker today, and another 20 unhappy with him next week on a different issue," Istook said. "It is a formula for ready-made chaos."

Also in 1997, Istook was a vocal opponent of letting members have a scheduled cost of living adjustment (COLA) to increase their pay, and he tried to force the leadership to schedule a floor vote on the issue. But when Gingrich greased the skids for the COLA to go through, Istook said he wouldn't try to force a vote. "What good would it do except increase internal antagonism?" he asked.

When Istook was named chairman of the Appropriations Subcommittee on the District of Columbia for the 106th, something like a groan arose from the subcommittee's ranking Democrat, James P. Moran of Virginia. Moran told The Washington Post that Istook in the past had been among the conservatives who bogged down progress on the D.C. appropriations bill by

**CAPITOL OFFICE**
225-2132; fax 226-1463; 2404 Rayburn Bldg. 20515

**INTERNET**
e-mail: istook@mail.house.gov
web: www.house.gov/istook

**COMMITTEES**
Appropriations (District of Columbia - chairman; Labor, Health & Human Services & Education; Defense)

**HOMETOWN**
Oklahoma City

**BORN**
Feb. 11, 1950, Ft. Worth, Texas

**RELIGION**
Mormon

**FAMILY**
Wife, Judy Lee Istook; five children

**EDUCATION**
Baylor U., B.A. 1971; Oklahoma City U., J.D. 1977

**CAREER**
Lawyer; gubernatorial aide; journalist

**POLITICAL HIGHLIGHTS**
Warr Acres City Council, 1983-86; Okla. House, 1987-93

**ELECTION RESULTS**

| | | |
|---|---|---|
| **1998 GENERAL** | | |
| Ernest Istook (R) | 103,217 | 68.2% |
| Mary C. Smothermon (D) | 48,182 | 31.8% |
| **1998 PRIMARY** | | |
| Ernest Istook (R) | | unopposed |
| **1996 GENERAL** | | |
| Ernest Istook (R) | 148,362 | 69.7% |
| James L. Forsythe (D) | 57,594 | 27.1% |
| Ava Kennedy (I) | 6,835 | 3.2% |

**PREVIOUS WINNING PERCENTAGES**
1994 (78%); 1992 (53%)

**DISTRICT VOTE FOR PRESIDENT**

| | DEM | GOP | IND |
|---|---|---|---|
| 1996: | 31% | 59% | 10% |
| 1992: | 25% | 51% | 24% |

attaching conservative policy language. Istook, for instance, sought to prohibit the District government from providing health care benefits to the unmarried domestic partners of city workers. "I don't think this portends well for the D.C. Appropriations Subcommittee," Moran told the Post.

But Istook came in like a lamb, saying in November 1998 that before laying out an agenda for his subcommittee, he planned "to do a lot of listening and a lot of homework. I can do more good by spending my time listening and studying, rather than making comments."

Istook, though, does not spend much time trying to sound reasonable about President Clinton. Complaining about the price tag of the omnibus appropriations bill that passed at the end of the 105th, Istook implied that Clinton had demanded extra spending so he could secure the backing of congressional liberals in his looming impeachment battle. "Because his future depends on their support," Istook said, "he made it clear that he would veto anything that didn't give the most liberal of the Democrats what they want in exchange. This is 'protection money,' and that's wrong. It's wrong for anyone to turn a blind eye toward the president's conduct so long as he delivers our tax money to pay for the big government that they want."

Members of the Appropriations Committee — even the conservative ones — typically see it as part of their job to deliver a generous share of federal largesse to their home districts and states. Istook is not immune to that impulse, but he has worked more to curb federal spending than to funnel it to his district. While he did secure funds to help rebuild the area of Oklahoma City surrounding the federal building that was destroyed in a 1995 bomb blast, he wanted the money spent just in that part of town, not more widely, so he added limiting language to that effect. Also, he opposed granting a federal subsidy to Oklahoma City for a city trolley system.

During work in the 105th on a massive transportation authorization bill, Istook asked for $15 million for a project on I-40 in Oklahoma. But as other members' special-request projects were added to the bill, its price tag (eventually $218 billion) provoked complaints from the cost-conscious. Istook supported an amendment that would have eliminated most of the special projects, including his in Oklahoma. "Needed and worthwhile projects, such as fixing Interstate 40 in Oklahoma City, were mixed in with questionable items which could never pass on their own," he said. But the amendment lost by a lopsided tally. Istook voted for final passage of the transportation bill.

The outlet for Istook's conservative social policy views has often been the appropriations process, in which he and his allies seek to write policy changes into spending bills. Debate on these controversial policy additions, known as "riders," frequently slows or even stalls passage of the appropriations measures. This has not endeared Istook to some of the Appropriations subcommittee chairmen, an elite fraternity he joined when he took the gavel of the D.C. Subcommittee in 1999.

During 1998 consideration of the bill funding the Labor, Health and Human Services, and Education departments (Labor-HHS), Istook proposed requiring federally funded clinics to notify parents before giving contraceptives to minors. "There is no other circumstance like this, where parents are cut out," he argued. The House approved his amendment, but when the Labor-HHS bill was folded into the catchall bill at the end of the 105th, the leadership dropped Istook's language.

In the 104th, Istook sought unsuccessfully to block the use of Medicaid money for abortions performed in cases of rape or incest. The proposal, backed by the House but ultimately dropped from a 1996 catchall spending bill, would have restored a ban that Congress had lifted when Clinton became president.

Also in the 104th, Istook used the Labor-HHS bill and other spending

## OKLAHOMA 5

## North Central — Part of Oklahoma City

North of Oklahoma City and running to the Kansas border, the rolling Midwestern plains become more evident in the 5th — an area comfortably clasped by Bible Belt conservatism. Starting in the state capital, the district wraps around Stillwater and Tulsa to Washington County, where lush forests and vegetation cover the land.

The boom of the early 1980s brought large population increases to parts of the district, but after the economy landed with a thud by decade's end, corporations scaled back and the population declined in some sections. By the early 1990s, the 5th's economy diversified out of necessity. While oil and gas still compose a large chunk of the economy, along with some agriculture, energy corporations have had to expand their businesses to plastics and other industries. Telecommunications companies such as Lucent Technologies are also taking hold in the district.

Although a plurality of voters register as Democrats, Republicans control the federal elections in the 5th, the most Republican district in the state. While other Oklahoma districts are increasingly voting for Republicans in presidential elections, voters in the 5th have consistently favored Republicans for decades.

**TOP EMPLOYERS**
Integris Health, Oklahoma City, 5,000-6,999; Lucent Technologies, Oklahoma City, 3,000-4,999; Phillips Petroleum Co., Bartlesville, 3,000-4,999; Conoco Pipeline Co., Ponca City, 1,000-2,999; United Parcel Service, Oklahoma City, 1,000-2,999; University of Central Oklahoma, Edmond, 1,000-2,999

**MAJOR INDUSTRY**
Oil, computer hardware, state government

**POPULATION**
523,729 (1990)

**CITIES**
Oklahoma City, (pt.) 239,395 (1990); Edmond, 63,475; Bartlesville, 33,733 (1996)

**PEOPLE**
69% urban; 13% age 65+ (ranks fourth of six in state; middle third nationally); 57% married couples, 26% married couples with children; 26% college educated (ranks first of six in state; top third nationally); 64% white collar (ranks first of six in state; top third nationally), 21% blue collar (ranks sixth of six in state; bottom third nationally) (1990)

**RACE**
87% white, 8% black, 2% Asian, 5% American Indian; 3% Hispanic origin (1990)

**MEDIAN HOUSEHOLD INCOME**
$28,348 (ranks first of six in state; middle third nationally) (1990)

**UNUSUAL FEATURES**
Guthrie was the original state capital, and Oklahoma City became the capital in 1910; Osage Indians discovered oil on their reservation in the late 19th century, and by the turn of the century, they were the richest people per capita in the United States.

## KEY VOTES

**1998**

Y Impeach President Clinton for grand jury perjury
Y Impeach President Clinton for civil suit perjury
N Pass omnibus spending bill
Y Give president fast-track trade negotiating authority
N Pass campaign finance overhaul
Y Pass GOP-drafted managed health care overhaul
Y Prohibit affirmative action in higher education admissions

**1997**

Y Support taxpayer-financed school tuition vouchers
N Support aid to international family planning organizations

## INTEREST GROUPS

| | AFL-CIO | ADA | CCUS | ACU |
|---|---|---|---|---|
| 1998 | n/a | 0% | 94% | 95% |
| 1997 | 0% | 5% | 89% | 100% |
| 1996 | 9% | 10% | 94% | 100% |
| 1995 | 0% | 0% | 96% | 96% |
| 1994 | 11% | 5% | 83% | 95% |
| 1993 | 0% | 10% | 100% | 100% |

## CQ VOTE STUDIES

| | PARTY UNITY | | PRESIDENTIAL SUPPORT | |
|---|---|---|---|---|
| | Support | Oppose | Support | Oppose |
| 1998 | 89% | 4% | 16% | 77% |
| 1997 | 93% | 3% | 17% | 77% |
| 1996 | 95% | 4% | 32% | 67% |
| 1995 | 92% | 3% | 16% | 82% |
| 1994 | 92% | 4% | 36% | 59% |
| 1993 | 90% | 6% | 30% | 69% |

## VOTING PARTICIPATION

| | |
|---|---|
| 1998 | 93% |
| 1997 | 96% |
| 1996 | 97% |
| 1995 | 95% |
| 1994 | 95% |
| 1993 | 96% |

bills as vehicles in an ultimately unsuccessful effort to bar groups from receiving federal grants if they devote more than 5 percent of their budgets to lobbying and other political advocacy efforts. He argued that these groups in effect use federal money to promote their agendas — spending federal dollars in pursuit of more federal dollars.

Another priority for Istook has been a constitutional amendment that would guarantee the right to pray in public schools. GOP leaders have brought the proposal to the House floor several times, but while a majority of members support it, it has fallen short of the two-thirds majority vote needed for approval.

In the 105th, Istook sought, unsuccessfully, to bring up a proposal making it easier for states to collect sales taxes from American Indian tribal businesses. Istook says the Supreme Court has ruled that taxes are due on purchases that take place on tribal land but are made by non-members of the tribe. But Congress, he contends, has not authorized a mechanism for states to enforce the tax regulations. Istook argues that Oklahoma loses more than $13 million in fuel taxes from its 18 tribally owned gas stations and that states and localities overall miss out on almost $1 billion of revenue each year.

**At Home:** After graduating from Baylor University with a journalism degree, Istook covered the Capitol in Oklahoma City as a radio reporter, went to law school at night, got married and started a family that grew to five children. After earning his law degree, he worked as an aide to Democratic Gov. David L. Boren and then went into private practice. His first elective office was on the city council in the Oklahoma City suburb of Warr Acres. In 1986, he won a seat in the state House, where he was assistant minority leader.

Campaigning for the House in 1992 on an anti-pork platform, Istook won the 5th District after denying renomination to eight-term GOP Rep. Mickey Edwards, who was damaged by having 386 House bank overdrafts.

Istook was neither the best-known nor the best-financed of the three leading candidates in the 1992 GOP primary for the 5th. Edwards had represented the district since 1977, and former U.S. Attorney Bill Price had been the GOP's 1990 nominee for governor.

The primary was billed as a match between two heavyweights, Edwards and Price. Both spent lavishly on television ads. Meanwhile, Istook ran a ground-level campaign that relied less on media ads and more on targeting likely GOP voters through direct mail and phone banks. He also refrained from personally attacking Edwards. Price's ads assailed the incumbent for his lengthy tenure as well as his problems with the bank. Price ran first in the primary, but it was Istook who made the runoff, not third-place finisher Edwards. In the runoff, Istook's surging campaign scored a 12-point victory over Price.

The Democratic nominee was Laurie Williams, an oil and gas lawyer from Oklahoma City making her first bid for political office. She labeled Istook an "extremist," taking issue in particular with his anti-abortion position. But the Republican tilt of the 5th gave Istook enough cushion to win with 53 percent. Re-elections have come easily since then.

Istook's 1998 opponent took him to task on his opposition to an Oklahoma City trolley system. Democratic challenger Mary C. Smothermon cited a vote Istook cast for legislation that included money for a light rail system in Salt Lake City, the site of the 2002 Winter Olympics. "If he wants to represent Salt Lake City, he should move to Utah," Smothermon said. Istook dismissed his opponent as "a marginal candidate who dreams up outrageous accusations to divert attention from her own positions." He won with 68 percent.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

MEMORANDUM FOR SECRETARY O'NEILL

Through: Chris Smith
Senior Advisor to the Secretary

From: Arthur Cameron
Deputy Assistant Secretary
Legislative Affairs and Public Liaison

Subject: Meeting with Ben Nighthorse Campbell, Chairman, Senate Appropriations Subcommittee on Treasury and General Government, Thursday February 1, 2001, 10:30 AM

**Background:**

You are scheduled to meet with Senator Ben Nighthorse Campbell, Chairman of the Senate Appropriations Subcommittee on Treasury and General Government to briefly discuss Treasury Appropriations.

The Treasury Department's relationship with the Subcommittee has always been professional and cordial. We anticipate that this relationship will continue during the 107th Congress.

Senator Campbell (R-CO), during his tenure as Chairman of the Subcommittee has been very supportive of the Department. In the past, Senator Campbell has left the nuances of many of the more financially related issues to his staff and has preferred to focus on the big picture issues of the Treasury Department. Last year, Senator Campbell was disappointed with the process that the Treasury Appropriations bill followed, where it was quickly moved to conference just prior to the August recess causing the Senate bill to not be voted upon on the Senate Floor. After the Summer recess when the Conference Report (which passed the House on a primarily party line vote) reached the floor of the Senate it did not pass, due to Democratic concerns over inadequate funding and lost significant Republican support on the issue of a Member's pay increase.

The Senator is also Chairman of the Indian Affairs Committee, was recently appointed to the Environment and Public Works Committee, serves on the Veterans Affairs Committee and Energy and Natural Resources Committee, and is Co-Chairman of the Helsinki Commission.

Senator Campbell is known throughout Washington as an avid motorcycle rider, lists his professions as Jewelry Designer and Rancher, was on the 1964 U.S. Olympic Judo Team, and personally drove the truck carrying the Capitol Christmas Tree from Colorado to Washington. Meetings with Senator Campbell are usually casual and informal.

**Analysis:**

Senator Campbell is expected to congratulate you on your appointment and confirmation to be Treasury Secretary and to express his desire to work cooperatively with you as we move through the FY 2002 appropriations process. The Clerk of the Subcommittee, Pat Raymond, will probably control the direction of the meeting as it relates to appropriations issues. Like her counterpart in the House, she has a very strong influence over the outcomes of issues contained within the Treasury appropriations bill.

Chairman Campbell is likely to talk about his strong support for the law enforcement bureaus, ATF, Customs, and Secret Service specifically. He will stress that having a strong Under Secretary for the Office of Enforcement is critical for effective oversight of the enforcement bureaus. At the same time, he will stress that a strong Under Secretary is also necessary because the law enforcement bureaus need a strong advocate as they often compete against the many other Federal law enforcement agencies for funding and authority. He may also ask about where we are in the process of finding a new Customs Commissioner (Former Commissioner was Ray Kelly.)

Last year, the Congress passed the American Buffalo Coin Commemorative Coin Act of 2000 which was sponsored by Senator Campbell. For Senator Campbell, this marks the end of a 3-4 year process in which he pushed the passage of this legislation. The coin's design will be based upon, and will be nearly identical to, the Buffalo Nickel issued in the mid-1900's. The major difference is that the coin will be the size of a standard silver dollar rather than the size of a nickel. The Mint is currently planning on producing the uncirculated versions of this commemorative at the Denver Mint; the proof versions will be produced at the Philadelphia Mint. Since this issue has been important to Senator Campbell for many years he may mention this in the meeting. He may also express his support for the Golden Dollar which bears the image of Sacagawea, the Shoshone woman who accompanied Lewis and Clark on their expedition proving critical to the success of the mission.

The Subcommittee has requested that you appear for a hearing on April 26th. We are currently working with the Subcommittee staff to ensure that this date fits well into your schedule and works well within this year's budget and appropriations process. This may come up during the meeting but should not be an issue at this point.

Attachments (3):

Talking Points for Meeting with Chairman Campbell
Summary of FY 2002 Budget Request
Biography of Chairman Campbell

## Talking Points for Meeting with Chairman Campbell

- I understand that your Committee has been supportive of Treasury's efforts to improve operations and meet continuing challenges in tax administration, law enforcement, and the many other Treasury core missions.

- I look forward to working with the Committee to balance Treasury's key programs against an environment of limited resources.

- This year's budget process is a bit different, but we will be working closely with the Committee on meeting Treasury and Committee goals within this broader process.

- [In response to law enforcement related issues] I share your commitment to the Treasury law enforcement bureaus and look forward to working with you as we work cooperatively to ensure that Treasury's law enforcement officers are the benchmark that all others are measured against.

- I would like to emphasize that I would like to have an open line of communication with this Committee. If you ever have an issue, no matter how small, with the Treasury Department you should always feel free to bring it up with me personally.

- Lastly, I would like to hear about some of the thoughts and concerns you may have about the Treasury Department so that I can focus on these as we work through the 2002 appropriations process.

# SUMMARY OF FY 2002 BUDGET REQUEST

## FY 2002 - A UNIQUE BUDGET REQUEST PROCESS

- Typical with the transition to a new administration, the **budget request process is delayed and condensed,** with the submission delayed from February to April.

- In addition, this year's FY 2002 process is **slightly unique** from prior change in Administrations:

  (1) Although Treasury provided an estimate of the Department's costs to maintain current services to OMB in November 2000, **OMB applied an automatic calculation method** (5.5% for pay and 2.0% for non-pay categories) to all Federal government agencies' FY 2001 financial plans **to estimate** each agency's **FY 2002 baseline requirements.**

  (2) **Instead of the traditional OMB budget process** to review, prioritize and approve agencies' requested FY 2002 initiatives, the Administration is undertaking a broad review of the overall budget and will be giving guidance to Agencies shortly.

  (3) In **late-February**, the **President will transmit his Blueprint and FY 2002 Budget Outline** to the Congress. This Blueprint will **become the basis for developing the complete**, detailed FY 2002 President's Budget **request** to Congress **scheduled for** submission in **early April.**

## RECAP OF FUNDING

- **FY 2001 - Enacted Appropriations: $13.997 Billion**

- **FY 2002** - January 16th **OMB Baseline Submission: 14.611 Billion** (excludes FY 2002 new initiative requests)

## FUNDING ISSUES

### (1) Maintaining Current Services

- Maintaining our current program levels will be an important objective in the near term and in FY 2002 – we will be working with the Committee on meeting these needs.

**(2) Programmatic Issues -** We will be addressing in this process additional program needs of important needs that continue to face the Department

- **IRS Reform and Restructure Implementation** - Continued support for Organizational Modernization (modernization and reform remain top priority for Treasury) and staffing investments to restore, stabilize and strengthen tax compliance and customer service programs

- **ATF Firearms Enforcement** -- Continued support against youth crime and for other firearms enforcement programs.

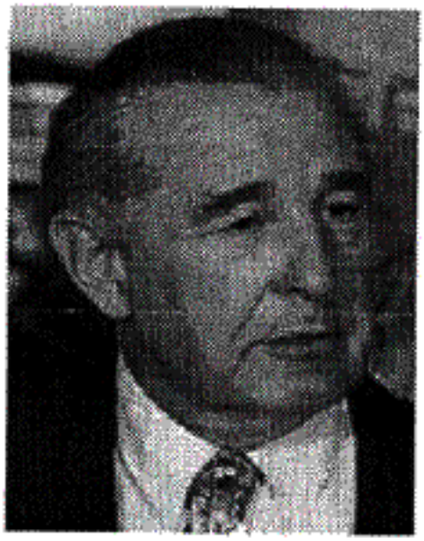
- **Customs Modernization** - In FY 2001, the Department made great progress in receiving funding critical to the modernization of Customs' trade processes. This investment is crucial to the vitality of Customs' mission.

- **Secret Service Protection Efforts** - Support to address workload and staff retention issues for the Service.

- **Money Laundering** - Continued support for the Money Laundering strategy jointly implemented between Treasury and Justice

- **Counter-Terrorism** - Continued support for Treasury bureaus' participation with the Joint Counter-Terrorism Task Force.

- **Office of Foreign Assets Control** (Departmental Offices) - Support for counter-terrorism efforts and for the Foreign Narcotics Kingpin Designation Act mandating a global sanctions program targeting foreign narcotics traffickers and organizations.



# Sen. Ben Nighthorse Campbell (R)

## Elected 1992; 2nd term

**In Washington:** A colorful individualist who sports a ponytail and cowboy boots, Campbell is a man of many interests —motorcycle touring, judo, jewelry making and ranching. With such passions, one might understand that the formal atmosphere and ponderous debates of the Senate do not always engage him. When telling the Rocky Mountain News in 1995 that he had mixed feelings about being in Congress, he added that if any senator talks about liking the job, "they're damn liars."

A political moderate, he tends to eschew alliances. While his politics have drifted to the right since his switch from the Democratic to the Republican Party in 1995, Campbell is hardly in lockstep with either his more conservative colleagues or the handful of Republican moderates. He tends to look out for the interests of his home state as well as for American Indians, but he rarely leaves his mark on major legislation.

Publicly ambivalent about staying in the Senate, Campbell in 1997 delayed an announcement of his re-election bid for months, disconcerting some Republicans, particularly 3rd District Rep. Scott McInnis, who had been preparing for a Senate run with the understanding that Campbell would step down. When he finally did decide to seek a second term, he faced opposition from within his own party and ranked near the top of the Democratic Party's hit list. But the Senate's lone American Indian member confounded his critics by appealing to the individualistic leanings of the Colorado electorate and swamping challengers from both the right and the left.

And then, true to form, he pulled on his biker leathers for a long-distance motorcycle trip one day after winning re-election, skipping traditional post-election analysis and talk about his next six years in Washington. "Ben said the first staff person to call him dies," said his campaign manager, Stuart Roy. "He just loaded up the motorcycles and took off."

Given Campbell's distaste for much that is political, it is not surprising that early in the 106th Congress he refused to pontificate about the impeachment trial of President Clinton. He turned down dozens of requests to appear on talk shows, insisting that he wanted to focus on the evidence and render an impartial judgment. "We need to make a fair, impartial judgment based on fact," he said. "We can't if we're constantly bleating about the trial."

He made news in another way during the trial: He showed up early in the morning outside the Capitol Building with a huge urn of coffee. He served up the steaming brew and chatted with members of the public waiting in line in the chill morning air for a chance to witness a few minutes of the trial. He paid for the coffee himself, although he admitted that he was able to negotiate a lower price with the Senate catering service "after I gave them enough guilt trips on patriotism and the American flag."

Campbell made a mark in the 105th as a strong advocate for American Indians and skillful supporter of federal funding for Colorado. A member of the Appropriations Committee, he snagged tens of millions of dollars in funding for projects ranging from anti-drug initiatives to military bases.

The Coloradan is not above reminding his colleagues of his heritage when fighting for a share of the federal pie. In 1997, he defended a $6 million appropriation for the controversial Animas-La Plata water project in Southwestern Colorado, despite concerns by both budget-cutting "deficit hawks" worried about wasting money and environmentalists worried about

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**COMMITTEES**
Appropriations (Commerce, Justice, State & Judiciary; Foreign Operations; Interior; Transportation; Treasury & General Government - chairman); Energy & Natural Resources (Forests & Public Land Management; National Parks, Historic Preservation & Recreation; Water & Power); Indian Affairs - chairman; Veterans' Affairs

**HOMETOWN**
Ignacio

**BORN**
April 13, 1933, Auburn, Calif.

**RELIGION**
Unspecified

**FAMILY**
Wife, Linda; two children

**EDUCATION**
San Jose State U., B.A. 1957; Meiji U. (Tokyo, Japan), attended 1960-64

**MILITARY SERVICE**
Air Force, 1951-53

**CAREER**
Jewelry designer; rancher; horse trainer; teacher

**POLITICAL HIGHLIGHTS**
Colo. House, 1983-87, served as a Democrat; U.S. House, 1987-93, served as a Democrat

**ELECTION RESULTS**

**1998 GENERAL**

| | | |
|---|---|---|
| Ben Nighthorse Campbell (R) | 829,370 | 62.5% |
| Dottie Lamm (D) | 464,754 | 35.0% |
| David S. Segal (LIBERT) | 14,024 | 1.1% |

**1998 PRIMARY**

| | | |
|---|---|---|
| Ben Nighthorse Campbell (R) | 154,702 | 70.6% |
| William Eggert (R) | 64,347 | 29.4% |

**PREVIOUS WINNING PERCENTAGES**
1992* (52%); 1990 House Election* (70%); 1988 House Election* (78%); 1986 House Election* (52%)
*Elected as a Democrat 1986-92

ecological damage. The project was backed by the Ute Indians who saw it as the fulfillment of a century-old government promise to ensure water supplies to the Southern Ute Reservation.

In a powerful floor speech, Campbell said: "We do not intentionally kill Indians with bullets or disease anymore. But it seems clear that some of our brothers want to kill their livelihood, kill their opportunity, kill their future, kill their culture and kill the natural resources that we promised them in every one of the 472 treaties that we then broke as an arm of the U.S. government."

Campbell, a member of the Northern Cheyenne tribe, is the first-ever Native American chairman of the Indian Affairs Committee and an ardent Senate supporter of Indian rights. When Slade Gorton, R-Wash., proposed in 1997 allowing federal civil suits against tribal governments, Campbell argued that such a move would expose the tribes to a rash of litigation and undermine their sovereignty.

But true to his general doubts about government, Campbell wants to encourage Indians to gradually wean themselves of their reliance on the federal government. "The movement has been toward self-determination, but it was limited self-determination," Campbell told The Washington Post. "If they could handle it, they could do it. That's the kind of thing I support."

Campbell sometimes cites his own life story in urging constituents to rely on themselves instead of government assistance. The senator, raised by an alcoholic father and a mother with tuberculosis, was a high-school dropout and a gang member before turning his life around.

Campbell had a rare moment in the national limelight when he announced his decision to join the GOP in March 1995, shortly after Republicans took over Congress. His statement came the day after he voted for a balanced-budget constitutional amendment that failed to win Senate passage; he decided he no longer was comfortable calling himself a Democrat.

The switch infuriated and dismayed Democrats. But on announcing his new party affiliation, Campbell underscored that he would continue on an independent course. "I have always been considered a moderate, much to the consternation of the Democratic Party," Campbell said. "My moderacy will now be to the consternation of the right wing of the Republican Party." In keeping with that statement, Campbell supported the successful Democratic attempt in the spring of 1996 to raise the minimum wage, a proposal many other Republicans initially resisted.

But he joined the conservative camp on some other high-profile issues. In September 1996, after being injured in a motorcycle accident that left him hospitalized, he announced his support of efforts to override President Clinton's veto of a bill banning a procedure opponents call "partial birth" abortion. Although declaring his continued support of a woman's right to abortion, Campbell said in a statement read on the Senate floor that after talking with hospital workers he met while recuperating from his accident, he had concluded the particular procedure was "an atrocity."

Campbell often receives high marks from conservative groups, particularly on fiscal and regulatory issues. But unlike many in the GOP, he is sympathetic to labor unions. In the 105th, he was the lone Republican to break party ranks and side with labor in a dispute over whether companies could refuse to hire union organizers.

Campbell has long been at odds with the Clinton administration's efforts to boost grazing fees and mining royalties on federally owned lands. Soon after starting his Senate career in 1993, Campbell was among a group of Western Democrats arguing that the plan would impose a hardship on ranchers and miners and depress an already weak economy.

Campbell attracted the support of several Western senators for a bill he proposed to limit the grazing fee increase to 25 percent. The bill, which was

## KEY VOTES

**1999**

Y Remove President Clinton for grand jury perjury
Y Remove President Clinton for obstruction of justice

**1998**

Y Pass omnibus spending bill
Y Override veto of bill to ban "partial birth" abortions
N Allow vote on bill to increase restrictions on tobacco industry and raise tobacco taxes
Y Restrict future NATO expansion
N Allow vote on campaign finance overhaul

**1997**

N Allow vote on bill to give president fast-track trade negotiating authority
Y Allow vote on bill to let companies offer comp time instead of overtime pay

## INTEREST GROUPS

| | AFL-CIO | ADA | CCUS | ACU |
|---|---|---|---|---|
| 1998 | n/a | 25% | 83% | 76% |
| 1997 | 29% | 25% | 60% | 72% |
| 1996 | 80% | 45% | 82% | 78% |
| 1995 | 22% | 30% | 94% | 59% |
| 1994 | 88% | 55% | 50% | 25% |
| 1993 | 80% | 75% | 18% | 12% |

## CQ VOTE STUDIES

| | PARTY UNITY | | PRESIDENTIAL SUPPORT | |
|---|---|---|---|---|
| | Support | Oppose | Support | Oppose |
| 1998 | 82% | 18% | 47% | 53% |
| 1997 | 83% | 17% | 65% | 33% |
| 1996 | 76% | 16% | 42% | 46% |
| 1995 | 79% | 20% | 38% | 62% |
| 1994 | 74% | 21% | 81% | 16% |
| 1993 | 77% | 19% | 82% | 17% |

## VOTING PARTICIPATION

| | |
|---|---|
| 1998 | 99% |
| 1997 | 99% |
| 1996 | 92% |
| 1995 | 98% |
| 1994 | 94% |
| 1993 | 96% |

unsuccessful, drew criticism from environmentalists and lawmakers who said it would not generate a fair return for public land use. When Interior Secretary Bruce Babbitt came out with a series of new regulations in May 1995 governing conditions for ranchers on grazing land, Campbell attacked the Interior plan as "a misconstrued proposal based on divisiveness, arrogance, emotion and politics."

Campbell's switch to the GOP was followed by an assignment to the Appropriations Committee, where he looked after Colorado's military bases and its war veterans in his roles on the military construction and veterans' affairs subcommittees. He chairs the Treasury and General Government Subcommittee and won an assignment in the 106th Congress to the Transportation Subcommittee, which will allow him to press for better air service to rural areas in Colorado and elsewhere.

**At Home:** After dropping out of high school, he served in the Air Force and worked his way through college driving a truck before finding success as an Olympian — he was on the U.S. judo team at the 1964 Games — a craftsman of contemporary Indian jewelry and a cattle rancher in southwest Colorado.

Campbell began his political career in 1982, winning a conservative-minded state House district. During four years in the legislature, he was a dependable vote for farmers and ranchers on water rights, amassing a record as a conservative Democrat. That positioned Campbell well for his 1986 challenge to GOP Rep. Mike Strang. "People are sick and tired of plastic politicians — professional politicians who have done nothing else with their lives," Campbell said. He won by drawing a big vote in blue-collar Pueblo and holding his own on the conservative Western Slope.

Campbell quickly established himself and won two easy re-elections before making his move for the Senate in 1992. He won the Democratic nomination over two well-known rivals, Richard Lamm and former Boulder County Commissioner Josie Heath, the unsuccessful 1990 Senate nominee. He entered the general-election race with a wide lead over GOP nominee Terry Considine, a businessman and a former state senator who had championed a term limits ballot initiative Coloradans passed in 1990.

Both candidates ran afoul of previous statements on their military service records, but Campbell's misstep seemed particularly embarrassing. He had to correct a statement in his campaign literature that said he had been trapped behind enemy lines in Korea for five weeks. Campbell acknowledged that such an incident never happened while he served in Korea with the Air Force police.

Considine managed to run well ahead of George Bush, who lost Colorado, but Campbell prevailed by 9 percentage points.

After "pretty seriously" mulling a bid for Colorado governor in 1998, Campbell decided instead to run for the Senate again. "I've got seniority now and chairmanship of a committee, and I can make a little more impact here," he said. But the Democrat-turned-Republican faced opposition from candidates in both parties and appeared to be one of the most endangered incumbents. His prospects seemed further dimmed in May 1998, when GOP lawyer Bill Eggert took 43 percent of the vote against Campbell in the state GOP convention, winning a spot on the August primary ballot and criticizing the incumbent for his support of abortion and union issues.

But Campbell crushed the underfunded Eggert in the primary, touting his own inspirational biography and running ads calling for tax cuts. He used a similar strategy in rolling over Democratic challenger Dottie Lamm, wife of former Gov. Richard D. Lamm and a 17-year columnist for The Denver Post. Outspending Lamm by nearly 2-to-1, he ran colorful ads that showed him dressed in a cowboy hat and denim shirt against a dramatic mountain background. He captured 63 percent of the vote.

# Linnet F. Deily

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email : linnet.deily@schwab.com

Linnet F. Deily was named Vice Chairman, Office of the President, for the Charles Schwab Corporation in October, 2000, with responsibility for guiding the firm's strategic direction and overseeing the client-focused integration of the corporation's various enterprises. Charles Schwab Corporation has been recognized as a leader in American industry, having recently been named "Company of the Year" by Forbes Magazine, and identified as one of the top five "Best Places to Work" by Fortune Magazine.

She is also a member of the Advisory Council to the Federal Reserve Bank's Board of Governors, representing the 12th District.

Since 1998, Deily led the Schwab Retail Group and had direct accountability for all general investment services; the company's 370 branches across the United States; its six major Investor Call Centers; its specialized retail and electronic brokerage services, as well as all internet retail activity, which collectively represented a staff of 10,000 employees. Under her leadership, Schwab expanded its retail account base by more than 1 million new client accounts each year to a present level in excess of 5.7 million accounts, and grew its assets by more than $250 billion.

Linnet Deily joined Schwab in 1996 as President of Schwab Institutional - Services for Investment Managers, responsible for the extensive trading, custodial, and support services provided by Schwab on behalf of over 5,700 independent Investment Managers across the country. The group amassed more than $100 billion in assets under her leadership, and is recognized as the premier provider of independent investment manager services in the United States.

Prior to joining Schwab, Deily was Chairman, President and Chief Executive Officer of First Interstate Bank of Texas, a $7 billion institution with 123 branches throughout Texas, employing more than 3,000 people. When she moved back to Texas to assume responsibility for the bank in 1988, First Interstate Bank of Texas was a financially troubled institution with annual losses in excess of $100 million. With private capital, she and her team turned the bank around, becoming recognized as a high-performance institution. During this period, she was additionally accountable for all of First Interstate Bancorp's 1100 branches throughout the western United States, the corporation's government affairs, and also served on the Executive Operating Committee of the corporation.

Linnet Deily began her banking career in 1974 with Republic National Bank of Dallas, rising quickly to the position of Senior Vice President, International Management, with administrative responsibility for Republic Bank's branch operations in London and Singapore, as well as of its Representative Offices in Sao Paulo, Caracas, México, Hong Kong and Tokyo. She joined First Interstate in 1981 as Vice President of First Interstate Bancorp. During the ensuing six years, she held both staff and line leadership positions with First Interstate Bank, Ltd., as well as with First Interstate Bank of California, and was appointed Executive Vice President in 1987.

She received her Bachelor of Arts Degree in Government from the University of Texas at

Austin in 1967, and her Master of Arts degree in International Management from the University of Texas at Dallas in 1976.

She is a past National President of the Committee of 100, an international organization of pre-eminent business women. In October, 2000, Fortune Magazine identified her as one of "The 50 Most Powerful Women in Business" in the United States.

Linnet Deily contributes much of her personal time and interest to numerous civic undertakings. By appointment of Governor George W. Bush, she served on the 9-member Board of Regents of the University of Texas System which includes nine academic and six health-related institutions in that state. She serves as Honorary Trustee of the Museum of Fine Arts, Houston; she is a Director of the American Conservatory Theatre in San Francisco, of Catalyst in New York, and of The Women's Museum in Dallas; and is, as well, a Director of the Board of Reliant Energy, one of the nation's major utility companies. She also serves as a member of the Vestry of St. Mary the Virgin Episcopal Church in San Francisco.

A fourth generation Texan, Linnet Deily was born in Dallas, and raised on Heritage Farm, a Centenary Farm in McKinney, Texas. She is married to Myron B. Deily.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

February 1, 2001

**INFORMATION**

**MEMORANDUM FOR SECRETARY O'NEILL**

**FROM:** Steve Radelet, Deputy Assistant Secretary SCR
(Africa, Middle East, and South Asia)

**SUBJECT:** Supplementary Materials for Briefing for Today's 3:00 p.m. NSC Principals Meeting on Gulf Policy

Please find attached supplementary background information on the enforcement of U.S. sanctions on Iraq by Treasury's Office of Foreign Assets Control (OFAC), for today's NSC meeting at 3:00 p.m.

cc: Kenneth Dam
Joe Engelhard
Mark Sobel

UNCLASSIFIED WITH SECRET ATTACHMENTS
DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

JAN 3 1 2001

BRIEFING

**MEMORANDUM FOR SECRETARY O'NEILL**

**FROM:** Mark Sobel, Acting Assistant Secretary, International Affairs

**SUBJECT:** Briefing for NSC Principals Meeting on Gulf Policy

**DATE AND TIME:** 3:00 p.m.-4:30 p.m., Thursday, February 1, 2001

**LOCATION:** White House Situation Room

**PARTICIPANTS:** Principals + 1

**PURPOSE:** To review the current state-of-play (including a CIA briefing on Iraq) and to examine policy questions on how to proceed.

**ATTACHMENTS:**

Tab A: Agenda and Policy Questions (from NSC) -- **SECRET**
Tab B: Economic Background on Iraq (from Deutsche Bank)
Tab C: Executive Summary: Political-Military Plan for Post-Saddam Iraq Crisis (interagency working paper) – **SECRET**
Tab D: Summary of United States Sanctions on Iraq
Tab E: "Iraq Sanctions Regime," State Department, for use in public statements

cc: Kenneth Dam
Joe Engelhard
Steve Radelet

**February 1, 2001**

**Memorandum From: Dina A. Ellis**
**To: Secretary if the Treasury, Paul O'Neill**

**RE: California Energy Crisis**

To: Secretary Paul O'Neill
From: Dina A. Ellis DAE
Date: February 1, 2001
Re: California Utilities

The White House/NEC has requested Treasury to compare and contrast the Chrysler bailout with the plan California is working towards regarding its utilities. They would like to have a draft by close of business Friday, February 2, 2001.

Attached is a proposed draft for your approval.

✓

**_____Approve** **____Disapprove** **____Approve with Edits**

**Comparison between California's plan to rescue PG&E and Southern California Edison, and the federal government's bailout of Chrysler 20 years ago**

**Chrysler rescue package**

The U.S. Government (USG) guaranteed $1.2 billion of Chrysler's bonds (legislated maximum $1.5 billion). In return, the USG was given a lien on all of Chrysler's assets. The agreement also required prior USG approval for all important operation decisions, including:

- All contracts over $10 million
- Any sales of assets
- New product plans

The USG insisted that all stakeholders share the pain; this condition turned out to be important to the success of the program.

- Banks restructured loans, granted interest forbearance, etc.
- State and local governments granted relief of property and other taxes.
- Labor unions made concessions, including renegotiating contracts without cost-of-living adjustments.

The agreement compensated the USG for the risk it was assuming

- The USG received a guarantee fee.
- The USG also received 10-year warrants on the company's stock. The warrants were worthless at the time of issue (as the company teetered on the brink of bankruptcy), but were sold 3 ½ years later for $300 million.

**California plan**

Details of California's plan are still sketchy, and in flux, having already changed several times in the last two weeks. Most of what has been put forward so far would require new legislation.

This is what Governor Davis proposed late last week:

- The state would become the main buyer of power on the wholesale market, largely through long-term contracts. It would then sell to the utilities, which would resell to their retail customers; the state could also sell directly to consumers.
- To ease the debt burden on the two largest utilities, Southern California Edison and PG&E, the state would sell bonds (presumably revenue bonds).
- Ratepayers would pay off the bonds through their monthly bills.

The plan does not explicitly include an increase in monthly rates. Until retail prices rise to reflect wholesale prices, the California plan may shore up the utilities' balance sheets, but it will not turn them into viable companies.

In one important respect, the California plan resembles the Chrysler bailout plan of 20 years ago: the plan would give the state warrants on the stock of the two companies, with a strike price that would presumably be set well above the market price at the time of issue. Important details,

however, are still unknown, including the size of the warrant package, the duration of the warrants, and their strike price.

**February 6, 2001**

**Memorandum from John C. Hambor, Director, Office of Microeconomic Analysis**
**To: Secretary of the Treasury Paul O'Neill**

**RE: Climate change Policy - Kyoto Protocol**

**INFORMATION**

**DEPARTMENT OF THE TREASURY**
**WASHINGTON, D.C. 20220**

February 6, 2001

**MEMORANDUM FOR SECRETARY O'NEILL**

**FROM:** John C. Hambor
Director, Office of Microeconomic Analysis

**SUBJECT:** Climate Change Policy Process

International context

The Administration is likely to face international pressure to engage quickly on the issue of climate change mitigation. International climate talks could resume as early as late May, although the U.S. has requested a delay until July. A preparatory meeting with the Umbrella group, the countries including Japan, Canada, and Australia with whom we closely cooperate in negotiations, is scheduled for March. In addition, preparations are underway to draft the OECD ministerial conclusions on sustainable development (including climate change and energy), the theme for this year's ministerial in May.

We understand from our Umbrella Group partners and European Union counterparts that they fully recognize our need to review our climate change agenda before resuming substantive international discussions. Discussions with other delegations indicate, however, that it is likely that some countries may soon contact the Administration at a high level to encourage our prompt and substantive engagement on climate.

Treasury role

Treasury has played an active role in the interagency climate policy process. Economic Policy has taken the lead on most aspects of the issue, although Tax Policy has covered tax elements of domestic policy proposals and OASIA has covered issues related to the role of multi-lateral development banks and the Global Environment Facility in assisting developing countries.

Recommended next steps

We recommend that an interagency process be established soon. We recommend an active role by Treasury to best ensure that the policy positions developed are efficient, effective, pragmatic, and integrated effectively into the Administration's overall energy strategy.

Economic Policy welcomes the opportunity to arrange a briefing for you. Given your considerable familiarity with the issues, we can tailor it to your interests. For example, we could include a scientific update of the recent findings by the Intergovernmental Panel on Climate Change, and the State Department could apprise you of the status of international negotiations. Economic Policy can also brief you on the economics of greenhouse gas emissions abatement, including analysis of the Kyoto Protocol.

Prepared by: Adele Morris

**February, 2001**

**Memorandum from: Secretary of Defense Donald Rumsfeld**
**To: Senior White House Officals**

**RE: Budget Issues, National Security Policy Issues, Post Cold War Threats**

# TALKING POINTS

# FY 01 AND FY 02-07 BUDGET ISSUES

- ***National Security Policy Issues – Post Cold War Threats***

1. The collapse of the Soviet empire has produced centrifugal forces in the world that have created new regional powers. Several of these are intensely hostile to the United States and are arming to deter us from bringing our conventional or nuclear power to bear in a regional crisis.

2. The post-Cold War liberalization of trade in advanced technology goods and services has made it possible for the poorest nations on earth to rapidly acquire the most destructive military technology ever devised including nuclear, chemical, and biological weapons and their means of delivery. We cannot prevent them from doing so.

3. The civil sector, not the defense sector now creates the enabling technologies for advanced military capabilities. These universally available technologies can be used to create "asymmetric" responses by small or medium sized states to our conventional military power that cannot defeat our forces, but can deny access to critical areas in Europe, the Middle East, and Asia. Conventional submarines, advanced air defense, attacks on our C4ISR infrastructure and similar "asymmetric" approaches can limit our ability to apply military power.

4. China, Russia, Iran, Iraq, North Korea and others are investing in these capabilities that exploit provocative lapses in US capabilities. Liberalized international trade will propagate these capabilities to others.

5. These threats can emerge very rapidly and with little or no warning. NOTE: Observations of FMR SECDEF Bill Cohen – missile threat to the US could emerge in one year).

CONCLUSION: The risk to US and alliance security is increasing as the US fails to respond effectively and decisively to asymmetric threats likely to characterize the first quarter of the 21st century.

- ***Some budget realities***

1. To achieve ZERO real growth in the defense budget over the FY 02-07 period, $113 billion must be added to the January '01 Clinton budget (FYDP).

2. If the last Bush I FYDP (FY 92-97) was extended at zero real growth through the FY 02-07 FYDP, $183.4 billion must be added to the januray '01 Clinton budget for FY '02-'07.

3. If the last Bush budget (FY 92-97) was extended through FY 00,

   - $119 billion more would have been spent for DoD than under Clinton.

   - $32 billion more would have been spent for the Intelligence Community than under Clinton.

***Conclusion: Using the Bush 1 baseline for FY 92-97 and extending it through FY 07, additional expenditure of $334 billion would be required*** ($151 billion in FY 92-01+ $183 billion in FY 02-07) ***to sustain the force at the Bush I level. These additional dollars, however, do not include the costs for transformation, or Bush II initiatives such as National Missile Defense, pay increases, et cetera.***

4. The need for substantial increases in defense expenditure (FY 02-07) is widely recognized by non-government specialists – left and right.

   - Congressional Budget Office: + $255 billion

   - Former SECDEFs James Schlesinger/Harold Brown: + $450 billion

   - CSIS: + $842 billion

5. Clinton FY 02-07 FYDP = 2.5% of GDP; the lowest since 1940.

   Additional BA to achieve 3.0% of GDP (FY 02-07) = $370 billion

   Additional BA to achieve 3.5% of GDP (FY 02-07) = $754 billion

- ***What happened to national defense since we last had a Bush in the White House?***

1. At the end of the Cold War, the Bush I administration cut the armed forces down to the "Base Force" (1991) which was reduced further by two Clinton administration reviews, the Bottom Up Review (1993) and the Quadrennial Defense Review (1997). The force structure was cut 35% and the DoD budget by 23%.

2. However, the forces and equipment that survived were worked much harder. Military personnel suffered the extreme demands of back-to-back overseas deployments, while equipment was subjected to overuse that accelerated aging.

- The number of naval vessels declined from 430 to 317, but no change was made in the number deployed on station abroad (~100-110 ships at any given time).

- Almost all categories of equipment are now at or beyond their service half-life, producing rapid increases in operating cost. Inadequate budgets for maintenance and spare parts have produced steep declines in their capability to perform their assigned mission (Mission capable rates have declined from 83% to 74% since 1991). Vast shortages of spare parts have led to an unprecedented rate of cannibalization of equipment (~ 12%).

- To use examples from just one service, the Air Force, major combat units' readiness is down 25% since 1996 (91% to 66%). Air Combat Command active unit readiness is down 37% from 1996 (86% to 49%). The House Armed Services Committee recently found that 99% of B-1B bombers were flying with parts cannibalized from other aircraft.

- The Clinton administration has taken a "procurement holiday" since 1995. To maintain the existing force structure, it is procuring less than half the number of ships and aircraft required. To maintain the force structure from 2001-2005, 1,228 additional aircraft 11 ships will have to be procured beyond those planned in the projected budget.

- The procurement holiday has created a potentially catastrophic circumstance for the US intelligence community. Over _____% of our intelligence satellites (___ of ___) are operating beyond their design life. Crucial gaps in coverage are inevitable, and an extremely dangerous inability to monitor developments abroad is possible.

- Under funding of the nuclear weapons program will significantly increase the risk that the President will be forced to resume nuclear testing. This is so because the program to certify nuclear weapons (new designs and the existing stockpile) – the Stockpile Stewardship Program – will not be completed until years after specialized design personnel with testing experience will have retired.

3. The military "quality of life" has deteriorated rapidly adversely affecting recruitment, retention, and readiness. New obligations of the DoD for military medical care, energy costs, and immediate needs to maintain Navy and Air Force flying hours, and similar costs require $4.4 billion supplemental funding in FY 01 simply to avoid further force structure and readiness reductions.

- ***What are we trying to achieve?***

1. We need to sustain our ability to deter the use of WMD and long-range missiles against the US, its forces abroad and allies by adapting our military posture to 21st century threats.

2. To do so, we must support the ability of the existing force structure to dissuade nations abroad from challenging our interests while we transform our military capabilities to 21st century conditions. If we do not, we must accept increased risk to our security interests. Hostile powers will find this condition provocative, and are likely to intensify challenges to our interests when they believe we are unable to respond effectively.

3. We need to both transform our armed forces to meet 21st century threats and maintain our ability to respond to current threats. A failure to do so will expose the US to unacceptable risk in either the short or long term.

4. We should take advantage of favorable political and macroeconomic circumstances to put a program to transform US defense capabilities promptly starting in FY 01. This can be accomplished by a defense burden that is ~ one-third of that we sustained when I came to the Congress in the early 1960s.

**February 20, 2001**

**Memorandum From: Office of Budget and Management Director, Mitch Daniels**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: President Bush Budget Plan - Budget Surplus**

# EXECUTIVE OFFICE OF THE PRESIDENT
# OFFICE OF MANAGEMENT AND BUDGET
# OFFICE OF ECONOMIC POLICY
# 17th PENNSYLVANIA AVENUE, N.W. (ROOM 244)
# WASHINGTON, D.C. 20503

## COVER SHEET

**Fax Number: (202) 395-1198**

Number of pages (excluding cover sheet): 3 Date: 2/20/01

TO: NAME: SECRETARY O'NEILL

ORGANIZATION:

TELEPHONE NO: FAX NO: 622-0073

FROM:

| | | | |
|---|---|---|---|
| Amy Smith | Associate Director | ____ | 395-5873 |
| Mark Wasserman | Senior Economist | ____ | 395-3824 |
| Ophelia D. West | Administration Support Staff | ____ | 395-5873 |

SPECIAL INSTRUCTIONS:
(PLEASE DELIVER TO ADDRESSEE IMMEDIATELY!!!)

FROM: MITCH DANIELS

HOPE THIS PRESENTATION IS MORE TO YOUR LIKING. REGARDS.

# THE PRESIDENT'S BUDGET PLAN

- Over the next ten years, the Federal Government is projected to collect $28 trillion in revenues from American taxpayers. The President's budget devotes roughly $22.4 trillion to extend the government we have today, including the President's new initiatives.

- This leaves a $5.6 trillion surplus. The President's budget takes a cautious approach to allocating this staggering sum, starting by saving the entire Social Security surplus -- nearly 50 percent of the total surplus -- for debt retirement and Social Security. None of the Social Security surplus will be used to fund other spending initiatives or tax relief.

- Even after setting aside Social Security and paying off an unprecedented amount of debt, $3.0 trillion of the expected surplus remains. The President's Budget devotes these funds to the following priorities:

  -- The Administration proposes to return $1.6 trillion of tax dollars to the taxpayers or about six cents out of every dollar that will be collected between 2002 and 2011.

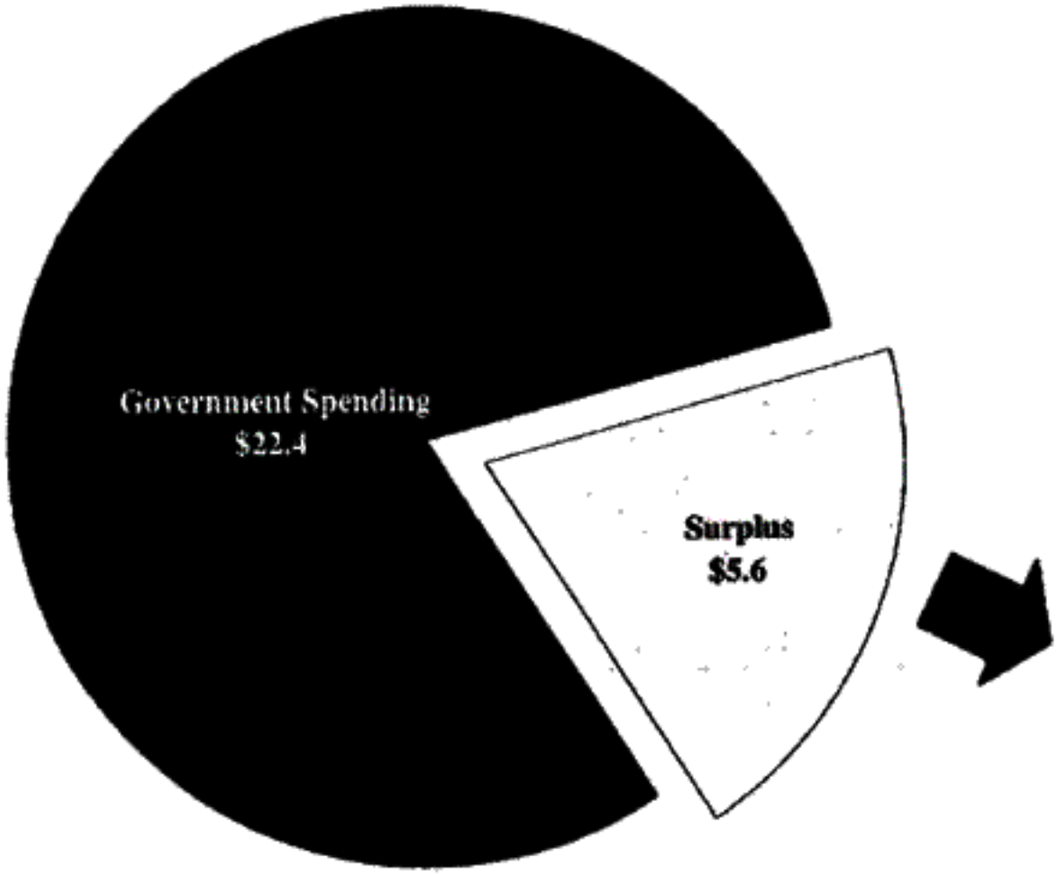
  -- The remaining $1.4 trillion will be used to fund additional needs, contingencies and debt service. The President proposes to use some of these funds -- $156 billion over ten years -- for Medicare reform, $400 billion for debt service and uses the remaining $900 billion to establish a reserve for future priorities and unexpected contingencies.

- Of course there are very large opportunities and contingencies that could ***expand*** the surpluses over these 10 years. These include government reforms that would reduce future costs and, largest of all, the chance that revenue continues to outpace estimates as it has for the last several years.

- In sum, there is ample room in the Administration's budget to pay off debt as far as possible, to reduce taxes for American families, to fund program priorities, and still hold roughly $1.4 trillion in reserve for Medicare modernization and to meet other programmatic and contingency needs as they arise.

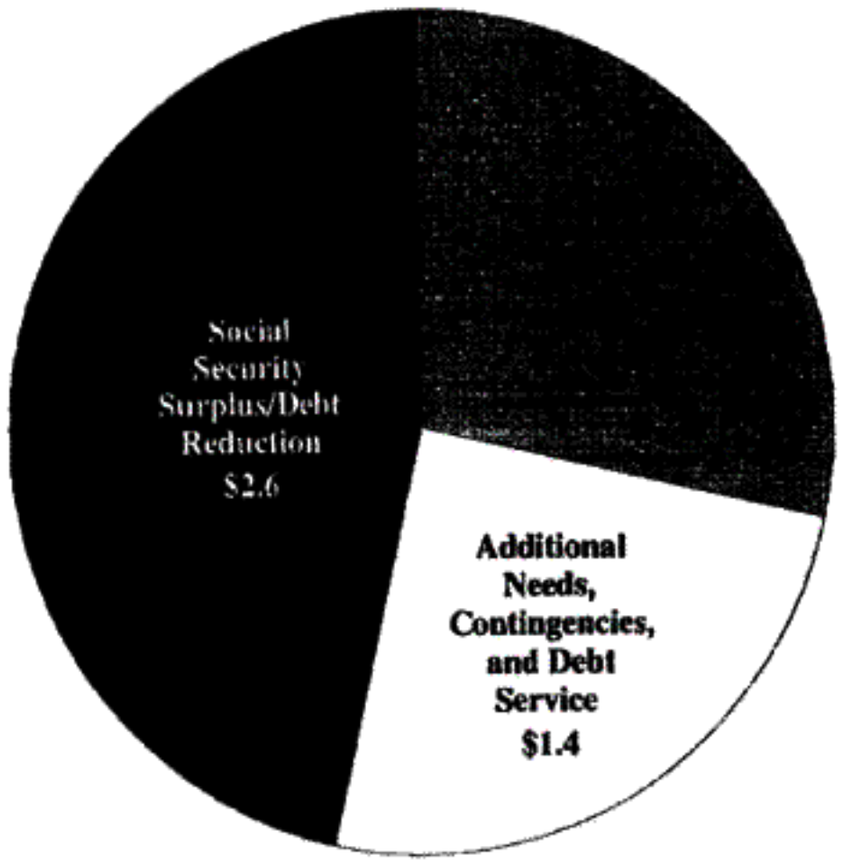
- Indeed, the President's budget is so fiscally conservative that the government will be able to retire all of the roughly $2 trillion in debt that is financially practicable to retire by 2011. In addition, his plan runs into an interesting "problem" -- after 2007, projected surpluses will be larger than the annual amount of maturing debt. The nation will then be faced with a choice of what to do with its remaining surpluses. This discussion must take place sooner, rather than later, lest the US government be forced into a position where it has no choice but to buy private assets with these funds – an option that the Administration opposes.

# Chart X-X. President's 10-Year Budget Plan




**Allocating $28.0 Trillion in Revenues, 2002-2011**

**Allocating $5.6 Trillion Surplus, 2002-2011**




FEB-20-2001 22:26 FROM EXOP/OMB/EP TO 96220073 P.03/04

# Chart X-X. President's 10-Year Budget Plan

## Allocating $5.6 Trillion Surplus, 2002-2011




FEB-20-2001 22:26 FROM EXOP/OMB/EP TO 96220073 P.04/04

**February 27, 2001**

**Memo from: Secretary of the Treasury Paul H. O'Neill**
**To: President George W. Bush**

**RE: Global Climate Change - Kyoto Protocol**

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

February 27, 2001

MEMORANDUM FOR THE PRESIDENT

FROM: Paul H. O'Neill

SUBJECT: Global Climate Change

Further to our discussion of global climate change, this is what I believe you should do.

1. Establish a predicate for creating the Bush Administration position on climate change.

   Set up a briefing to hear from the experts on the substance of the subject and to review the evolution of U.S. policy in international treaty development.

   (Use this occasion as a photo opportunity to footnote the careful and deliberate consideration of the creation of your policy on climate change.)

   On the substance, you should know that if the Kyoto treaty were fully implemented as agreed, it would push out the atmospheric accumulation of greenhouse gases by eleven years. In other words, the currently projected accumulation for 2050 would occur in 2061. (This is a trivial impact if the problem is real. As you know, I think this could be a very big problem.) For the U.S., full implementation of Kyoto would mean reducing our energy consumption from its projected level by more than 30% in the 2008-2012 time period.

   The reason for the large impact on the U.S. and the small impact on greenhouse gases is the lack of developing country inclusion in the coverage of the Kyoto treaty.

   The limited impact of Kyoto on greenhouse gas concentrations is understood by the analytic people in the environmental organizations but they support Kyoto anyway, believing it to be "the nose under the tent" and "the only game in town".

2. Establish a group to develop a multifaceted approach to global climate change.

A few days after your briefing, announce the formation of a group to do the following:

A. Prepare a document, for broad public use, that spells out the scientific facts that we know for certain regarding greenhouse gas concentrations, how they have changed over time and the linkage between such gases and global climate change. This document should also include projections of greenhouse gas accumulations, associated changes in global climate and the assumptions, that drive the changes, e.g., energy intensity of developing countries, the one hundred year "half-life" of greenhouse gases, etc.

B. To develop a process for achieving a consensus on the targeted limit of greenhouse gas concentrations.

(Only when we have this number is it possible to fashion a set of world interventions and actions that make economic and environmental sense.)

C. To develop a comprehensive catalog of information that describes where greenhouse gases are coming from; by geography, by energy source, by all other sources, (volcanic activity, animals, pipeline leakages, etc.).

D. To develop a comprehensive catalog of possible actions, including scientific work and technological innovations. Each item in this catalog should include an assessment of the cost to pursue, the estimated time to completion of the work, the value to be gained in reduction of concentrations and the probability of success.

(Some of the work in 2.A-D will be ongoing, but you should ask for a first report so that you can use it as a basis for a speech on Earth Day.)

E. Prepare an analysis of the available process options for amending or replacing the Kyoto treaty along with recommendations as to how best to engage the world community in a re-consideration and replacement of the treaty with a plan that is grounded in science and aimed at reducing concentrations rather than emissions.

3. Set out the Bush Administration policy on global climate change and begin taking action on the avenues developed in #2.

Hopefully, the major work needed to stake out the U.S. position can be completed in time for the continuing Kyoto treaty talks scheduled for this summer.

How to Get Started

As is the case in the energy issue, there are many departments and agencies which need to be engaged by this process. You asked the Vice President to chair the energy group because of the cross-cutting nature of the problem. Since energy and the environment are in many ways the same problem you might consider adding the global climate change issue to the charge of the energy committee. If you did so, it would be the first time in my memory that a President would have said these subjects must be considered together.

Aside from the organizational assignment problem, I wanted to give you my views on outside people who could be helpful as the administration works on these subjects.

George Shultz is the best convenor of experts, developer of policy positions I have ever known. If you want a respected outside person to lead this work through the development stages, he is the best.

Technical experts – Bill Merrill, President of the Heinz Center for Science, Economics and the Environment is one of the most balanced, unbiased environmental scientists I know. He could lead the briefing that is suggested in item 1. (You may know him. He was the President of Texas A&M.)

Michael Oppenhaimer is an environmental scientist at the Environmental Defense Fund. He is also broadly respected by his peers.

Jared Cohen is the President of Carnegie Mellon University; also an environmental scientist.

There are many other individuals, outside the government, who would help if asked.

**February 27, 2001**

**Memorandum From: Assistant Secretary of the Treasury, Michele Davis**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: Need to Stay on Message Concerning the President's Budget**

# MEMO

To: Secretary O'Neill
From: Michele
Date: Tuesday 2/27/01
Re: Tomorrow's Press Conference Unveiling the Budget

You and Mitch Daniels are scheduled to unveil the President's budget at a press conference in the OEOB at 10:15 tomorrow morning. This event, more than anything you've participated in to date, requires that you be monotonously on-message. In addition to the media attending, this event is simulcast to the White House press corp that is traveling with the President in Pennsylvania.

Daniels will speak first, and he will present the overall themes of controlling the growth in spending and paying off all the debt available for retirement. He will leave most of the tax cut discussion to you.

Your role is to 1) repeat the message that we will pay off all the debt available to pay off and 2) state clearly that we must cut taxes because we take more from people than we need to fund these new priorities, and if we don't give it back to the people who paid it, we'll end up wasting it in Washington.

Key background information: The public prefers spending on things like health care and education over cutting taxes. It's crucial that your remarks make clear that there is no trade off here – that we will boost education spending and set aside Social Security and Medicare surpluses to address the future of those programs, and still we will have an enormous surplus. This isn't an "either/or" question.

Roll-out events like this are the clearest examples of when staying on message is absolutely crucial. Any deviation during the unveiling of the budget will change the way coverage plays out from tomorrow forward. For example, you do not want to discuss potential Social Security reform ideas. Your remarks should be very focussed and your answers during the Q and A should only repeat your remarks.

1. We have funded America's priorities of education and national defense.
2. We have walled off Social Security and Medicare funds where they can only be used to modernize those programs.
3. We will pay off all the debt available to be retired.
4. That still leaves an enormous surplus. We need structural tax reform, because the tax system is taking more from working people than Washington needs to pay for America's priorities.
5. If we don't let taxpayers keep more of what they earn, those tax surpluses will be spent expanding government beyond our needs. Spending grew 8% last year – that's a recipe for waste.

6. We all know government is full of duplication – there are places we need to consolidate programs and spend the taxpayers' money more wisely. But we won't do that as long as we are awash in tax surpluses.
7. Today's federal tax burden is higher than it's been at any time in our nation's history. It's time to give tax relief to taxpayers, and lay the groundwork for a consumer-led expansion in the economy.
8. It's time to cut income taxes, so people keep more of what they earn, and decide for themselves how best to spend it.

Likely Questions:

1) If some agency budgets are growing faster than 4%, some other programs must be growing below that rate. You are cutting some programs, are you not? Which ones?

   There is plenty of duplication throughout the federal budget. We have dozens of programs in various departments all targeting the same problem. We need to figure out which ones are working, and target our resources accordingly.

2) Are you cutting Customs funding and letting up on the war on drugs?

   We are beefing up the war on drugs. The President's budget spends $35 million on the Western Hemisphere Drug Elimination Act to improve interdiction.

3) You say the "non-retireable" debt is $1.2 trillion, while CBO puts it at only $800 billion. Why the difference?

   OMB and CBO have different assumptions about buybacks over the next 5 years. OMB continues the previous Administration's insistence that we not project buybacks beyond the current year. We haven't adjusted that position because I do not have all my debt management officials in place yet at Treasury to conduct a full review. In either case, a substantial amount of debt remains in 2011. More importantly, even the CBO's estimate of a higher amount of potential debt reduction does not alter the allocation of the $5.6 trillion surplus. We have committed to locking away the $2.6 trillion Social Security surplus is locked away where it can only be used to pay down the debt. That $2.6 trillion in Social Security surplus would cover all possible debt retirement even if the CBO estimates turn out to be accurate.

4) But if CBO is right, that means there is less money for individual Social Security accounts.

   That's a question for another day. I'm looking forward to Social Security reform as much as you are, but first things first. Let's retire as much of the debt as we can and eliminate the structural overtaxation that puts today's federal tax burden at an all time high. That's enough to keep us busy for a while – then we can turn our attention to Social Security reform.

5) Why are we just now finding out about this so-called 'unretireable' debt?

This is a new policy area for all of us -- we've never had the huge surpluses we have today.

6) If you are worried about the economy, why not include business tax cuts?

First of all, small businesses are the engine of growth in our economy, and a majority of small businesses are taxed under the individual income tax. Cutting rates at the high end will mean small businesses will keep more of what they earn, and plow it back into their firms to hire more workers or to increase productivity, which in turn increases wages.
Second, allowing people to keep more of what they earn will help to lay the groundwork for another consumer-led expansion.

7) What do you think of the House plan to break up the tax bill into several pieces?

We'll work with the Congress on legislative strategy. I'm glad the House is eager to get to work on this right away, and I'm looking forward to working with them to achieve the President's goals of cutting income tax rates across the board and making our tax code more pro-family.

8) If you are worried about the economy, why not make the tax cut bigger?

It may turn out that the surplus will be much larger over the next 10 years than it is projected to be. When that becomes clear, I'll be more than happy to cut taxes again. In fact, I hope that we will turn our attention in the future to overall tax reform, and create a system that is simpler and fairer than what we have today. For now, let's enact the President's tax relief plan. We know there's plenty of tax surplus to make this plan possible. If more materializes, we can always do more tax cuts later.

**March 1, 2001**

**Document Sent From: Secretary of Commerce, Don Evans**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: Clime change Policy, Concerns of Republican Senator Chuck Hagel of Nebraska, an anonymous letter on State Department stationery**

# SECRETARY OF COMMERCE

## U.S. Department of Commerce

Facsimile coversheet

Date: March 1, 2001 Fax: 622-0073

To: Secretary O'Neill Phone: (202) 482-2112

From: Secretary Evans Fax: (202) 482-2741

Total pages including coversheet: 14

Subject: Yes conversation

Message:

Department of Commerce

CHUCK HAGEL
NEBRASKA

248 RUSSELL SENATE OFFICE BUILDING
(202) 224-4224
(202) 224-9083 TTY/TDD

United States Senate
WASHINGTON, DC 20510-2705

FOREIGN RELATIONS
CHAIR, SUBCOMMITTEE ON INTERNATIONAL ECONOMIC POLICY, EXPORT AND TRADE PROMOTION

BANKING, HOUSING, AND URBAN AFFAIRS
CHAIR, SUBCOMMITTEE ON INTERNATIONAL TRADE AND FINANCE

ENERGY AND NATURAL RESOURCES

BUDGET

**February 26, 2001**

## CLIMATE CHANGE SCIENCE CONTENTIONS AND EVIDENCE

*In general, it is important to distinguish between what is known and not known in the current science of climate change. It is an indisputable fact that atmospheric concentrations of carbon dioxide ($CO^2$) have grown as a result of manmade $CO^2$ emissions after the onset of the industrial revolution. Likewise, it is a fact that $CO^2$ is a greenhouse gas, and that the global greenhouse effect has a warming effect on the earth (in fact, it makes life possible). What is not known with any certainty is the extent to which increases in $CO^2$ atmospheric concentrations will affect global temperatures, nor is it clearly known the relative importance to global temperatures and temperature changes between solar factors, greenhouse gas factors, and other factors. It is not known at what point an increase in greenhouse gas concentrations will lead to a dangerous warming of the earth, nor even exactly what impact warmer climates will have on human health, well being, and economic prosperity.*

*Following are many of the climate change allegations that have been made, followed by peer-reviewed scientific findings in the most prestigious scientific journals.*

### Global Warming Trends:

CONTENTION: The world has been warming rapidly in the last two decades, averaging 1.3 degrees centigrade since 1979. Sophisticated computer models (General Circulation Models [GCMs]) show dramatic future warming over the next 100 years.

EVIDENCE: Warming data since 1979 can only be found in earth-based measurements, which are not truly global in reach. Satellite and weather balloon data show no long-term warming. Analyses that show dramatic warming in the last few years conveniently set their start date at 1998, which brings in a one-year spike in world

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chuck_hagel@hagel.senate.gov

temperatures as a result of an El Niño event, but which excludes the unusually low temperatures of 1992-1994. As for the discrepancy between ground-based temperature measurements and satellite/weather balloon measurements, either there are technical problems with the earth-based measurements, or there is a divergence between ground-level warming and no warming in the upper atmosphere. No computer model has yet been able to explain this discrepancy between the lower and upper atmosphere.[1]

**Health Impacts:**

CONTENTION: Future warming will cause serious health affects by increasing the spread of tropical diseases.

EVIDENCE: Scientific epidemiological studies show that climate has a minimal impact on the rates of disease transmission and human death. The statistically significant factors are the level of economic development, infrastructure, access to health care and potable water, and availability of air conditioning.[2]

**Sea-level Rise:**

CONTENTION: The melting of ice in polar regions, coupled with an overall warming of the ocean will produce a devastating rise in the global sea level.

EVIDENCE: The only significant threat to a rise in the sea-level is ice cap melting in Greenland and Antarctica. Scientific studies are divided over whether Greenland and Antarctica are experiencing net melting or net accumulation of ice. The U.N.'s Intergovernmental Panel on Climate Change itself has produced 100-year estimates of sea level rises ranging from a 10.6-inch

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[1] J.K. Angell in Aug. 1999 *Journal of Climate*; J.R. Christy and R.W. Spencer originally reported in the March 1990 *Science*, with regular updates.

[2] P. Reiter in 1996 and 1998 *The Lancet*; R.E. Davis, et al., in 1999 *Proceedings of the 1999 International Congress of Biometeorology*; K.E. Kunkel, et al., June 1999 *Bulletin of the American Meteorological Society*; and A. Lerchl in Dec. 1998 *International Journal of Biometeorology*.

rise to a 2.2-inch decrease, assuming significant global warming. Relationships between increasing temperatures and snow and ice melt, precipitation, and ocean thermal expansion are extremely complex. Much more study is needed in this area.[3]

**Droughts and Floods:**

CONTENTION: Global warming will produce more extreme weather events across the globe, resulting in more flooding in some areas and more droughts in others.

EVIDENCE: Projections of future changes in precipitation from global warming come entirely from computer models, not from actual observation. These models often conflict with one another. There is no global system for actual measurement over time of changes in precipitation levels. Good records do exist in the United States, which show a modest increase in average precipitation over the last century, without any increase in the incident of flooding or droughts.[4]

**Global Warming and Atlantic Hurricanes:**

CONTENTION: Global warming will produce an increase in the intensity and frequency of Atlantic hurricanes.

EVIDENCE: These claims are based on computer models rather than physical reality. Based on historical records, the frequency of large, landfalling Atlantic hurricanes has dropped despite increased concentrations of carbon dioxide. Long-term trends show either no change or an overall decline in hurricane activity, depending on the period of record. However, there has been a substantial

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[3] A.M. Ohmura, et al., in Sept. 1996 *Journal of Climate*; H. Ye and J.R. Mather in Feb. 1997 *International Journal of Climatology*; R.C. Balling, Jr., et al., in Feb. 27, 1998 *Climate Research*; R.E. Davis et al., in May 27, 1999 *Journal of Geophysical Research*; E.J. Dlugokencky, et al., in June 4, 1998 *Nature*; J. Hansen, et al., April 1998 *Proceedings of the National Academy of Sciences*.

[4] T.R. Karl, et al., in Feb. 1996 *Bulletin of the American Meteorological Society*; H.F. Lins and J.R. Slack in Jan. 15, 1999 *Geophysical Research Letters*; and K.E. Kunkel in June 1999 *Bulletin of the American Meteorological Society*.

increase in damage to coastal property from hurricanes. This increase is entirely accounted for by increased real estate development along the hurricane-prone American coastlines.[5]

**El Niño and Global Warming:**

CONTENTION: As global warming progresses, El Niño climate events (a prolonged periodic warming of ocean waters off the coast of Peru and related impacts on atmospheric and oceanic circulation) will become more frequent and severe. In the last two decades there have been as many El Niño events as normally would only occur every 2000 years.

EVIDENCE: El Niño events have been a natural component of the earth's climate for thousands of years. Based on data from geological records, there is no evidence that there was more El Niño activity 4,000 to 7,000 years ago when the planet was about 2 degrees centigrade warmer than today. There have been increases and decreases in El Niño events over the centuries, long before increases in manmade greenhouse gas emissions.[6]

**Computer "General Circulation" Models:**

CONTENTION: Computer General Circulation Models (GCMs) are the most sophisticated tools available to predict future climate changes. These physically-based models can reproduce past and current climate variability, so future predictions are also reliable over long time scales.

EVIDENCE: There are over 30 GCMs being used worldwide, and their projections vary dramatically. If global climate changes could easily or reliably modeled, the disparities would be small. Furthermore, these large climate models have not been successful

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[5] C.W. Landsea, et al., in June 15, 1996 *Geophysical Research Letters*; L. Bengtsson, et al., in Jan. 1996 *Tellus*; and K.E. Kunkel in June 1999 *Bulletin of the American Meteorological Society*.

[6] R.H. Grove in May 28, 1998 *Nature*, X.Z. Liang and W.C. Wang in Apr. 1, 1998 *Geophysical Research Letters*; D.Z. Sun in Aug. 15, 1997 *Geophysical Research Letters*.

in reproducing past climate variations accurately, raising further questions about the reliability of future climate changes.[7]

**Ice Core Evidence on the $CO^2$/Global Warming Connection:**

CONTENTION: Perhaps the single most convincing argument that an enhanced greenhouse effect will lead to global warming is that in ice core records extending back several hundred thousand years, periods of high global temperatures were associated with elevated atmospheric carbon dioxide levels.

EVIDENCE: New scientific studies have shown that higher $CO^2$ levels began after not before temperature increases. Understanding the interaction between the ocean and the atmosphere explains this phenomenon. Warmer water holds less dissolved carbon dioxide than cooler water. Therefore, as the atmosphere warms, the ocean warms and then releases additional $CO^2$ into the atmosphere. While this added $CO^2$ in the atmosphere may enhance the greenhouse effect, thus helping to fully bring the earth out of an ice age, the added $CO^2$ did not initiate the warming, but occurred as a result of it.[8]

**Sun/Climate Link with Global Warming:**

CONTENTION: Increased emissions of manmade greenhouse gas emissions has led to temperature increases of 0.7 degree centigrade (about 1 degree Fahrenheit) over the last 100 years.

EVIDENCE: The 0.7 degree centigrade increase in global temperatures since 1900 has not been a continual increase. Earth-based temperatures rose rapidly from 1900 to the mid 1930s, held constant until the late 1970s, and have since been measured (by ground-based measurement) as resuming a modest warming trend. Most of the temperature increase since 1900 occurred in the first third of the century, a time when manmade greenhouse

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[7] J. Hansen, et al., in Apr. 1998 *Proceedings of the National Academy of Sciences*; W.L. Gates, et al., in Jan. 1999 *Bulletin of the American Meteorological Society*; T.P Barnett in Feb. 1999 *Journal of Climate*.

[8] H. Fischer, et al., in March 12, 1999 *Science*; J.R. Petit, et al., in June 3, 1999 *Nature*.

gas emissions were low. Obviously, the earth has undergone dramatic swings in temperatures, long before the industrial revolution or even the rise of man. Changes in solar activity appear to be the main source of warming early in the century. Using historical sunspot data, more recent satellite solar radiation measurements, chemical data from tree rings, and other sources, a reliable record of solar output has been reconstructed for the past 400 years. Changes in this solar output data is a close match to changes in global temperatures over this same period. Other factors also play a role, including volcanic activity and changes in greenhouse gas concentration in the atmosphere (both natural and manmade). But the single closest correlation appears to be changes in solar activity.[9]

**Coral Bleaching and Global Warming:**

CONTENTION: Massive coral bleachings occurred during 1998, the hottest year in the last six centuries. Together, rising global temperatures and rising levels of carbon dioxide are the primary cause, which will wipe out most of the coral in the world's oceans by the end of this century.

EVIDENCE: Coral bleaching occurs when corals expel a symbiotic algae that the corals rely on to survive. When this occurs, the corals die and lose their color. Bleaching occurs when the corals become environmentally stressed, through exposure to high water temperatures, increased levels of toxic chemicals, or increased sediments in the water column. The main source of sediments in coastal waters comes from coastal development. The main source of toxic chemicals is man-made water pollution. Neither have any link with climate change. The primary source of rapid temperature rises in water that stressed coral reefs in 1998 was the unusually strong 1997-1998 El Niño event.[10]

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[9] W. Soon and S. Baliunas, et al., in Oct. 26, 1999 *Inter-Research*; Lockwood, et al., in June 3, 1999 *Nature*; J. Lean and D. Rind in Dec. 1998 *Journal of Climate*.

[10] C. Wildenson, et al., in March 1999 *Ambio*, R.C. Balling, Jr., et al., in Feb. 27, 1998 *Climate Research*, D.G. Sanweiss, et al., in Sept. 13, 1998 *Climate Research*.

February 27, 2001

# Memo

**To:** The Honorable Richard Armitage
Deputy Secretary of State-Designate

**From:** Senator Chuck Hagel

**Re:** Climate Change policies and personnel.

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Attached is background on the problems we discussed this morning. We need to get control of this.

The first item is an anonymous letter I received (along with four of my colleagues) regarding continued efforts by Ian Bowles (White House) and Daniel Bodansky (OES at State) to quietly and continually negotiate aspects of the Kyoto Protocol without any Bush Administration oversight or awareness.

The second item is a December 6, 2000 letter four of my colleagues and I sent to President Clinton. The letter discussed the failed climate change negotiations last November in The Hague during the Sixth Conference of the Partics (COP-6) of the Framework Convention on Climate Change. In the letter we expressed concern over (1) the extraordinary and unacceptable concessions Clinton Administration negotiators had made in The Hague and (2) the Administration's continued efforts to negotiate a very bad last-minute deal on climate change issues with the European Union.

The third item includes several email messages discussing plans for U.S.-EU negotiations set up by Mr. Bodansky for next week on the "sinks" provisions of the Kyoto Protocol.

The fourth item is a February 16, 2001 *New York Times* story on the climate change issue. Toward the end, it mentions one of the Clinton Administration's political appointee hold-overs, Ian Bowles, who continues to work at the National Security Council as senior director for environmental affairs. Mr. Bowles is the former head of the environmental group Conservation International and is also a former Democrat candidate for Congress. Incidentally, Mr. Bowles has discussed in the press his plans to run in the Democrat primary for Lieutenant Governor of Massachusetts.

Fifth, I am including a letter I received last week from Secretary of Commerce Don Evans. I am sure that Secretary Evans considered it a simple cover letter for the U.N. Intergovernmental Panel on Climate Change's (IPCC) Summary for Policymakers. Secretary Evans may not have been informed that the content and tone of this Summary is controversial, or that the two follow-on IPCC working group products that he mentioned were negotiated just before and just after President Bush's Inauguration by Clinton Administration climate change hold-overs who reportedly strongly advocated the policies and positions of the past Administration and who opposed the efforts of allied nations such as Australia to inject greater balance into those documents. I will speak to Don about this.

Thanks, Rich, for your help on bringing this issue firmly under the control of the Bush Administration.

United States Department of State

*Washington, D.C. 20520*

February 15, 2001

Senator Chuck Hagel
Senator Frank Murkowski
Senator Jesse Helms
Senator Larry Craig
Senator Mike Enzi

Dear Senators:

In your letter of December 6, 2000 to President Clinton, you expressed concern with the huge concessions made in November in The Hague on the degree to which the United States could rely on sinks and emission trading.

The very same Clinton political appointees who negotiated those concessions are now beginning to do the same under the Bush Administration without specific political guidance from the new Administration.

Daniel Bodansky and Ian Bowles are Gore supporters who are seeking to box the Bush Administration into a corner where it will have to choose between a bad deal and international embarrassment.

Please do not let this happen.

URGENT

We urge U.S. negotiators to keep these facts in mind as they undertake renewed discussions with the European Union and other nations on the climate change issue and before they agree to any new deals.

Thank you.

Sincerely,

CHUCK HAGEL
United States Senator

FRANK MURKOWSKI
United States Senator

JESSE HELMS
United States Senator

LARRY CRAIG
United States Senator

MIKE ENZI
United States Senator

## Bodansky, Daniel M (OES)

**From:** Mouton, Steven M
**Sent:** Friday, February 16, 2001 8:53 AM
**To:** Bodansky, Daniel M (OES)(FO); Nyman, Elisha E(Main State); Talley, Trigg (OES)(ENV)
**Cc:** Breidenich, Clare R (OES)(EGC); Miotke, Jeffery A (OES)(EGC); Wickwire, Susan X (OES)(EGC); 'cbreidenich@yahoo.com'; Derse, Anne E; Driano, Susan J
**Subject:** RE: Sinks/Environment Council

CABLE TO FOLLOW...

EU has agreed to meet on March 7, beginning at 1000 in DG Env spaces. I spoke with Marianne Wenning (DHoU Climate Change and sinks expert) briefly this morning...she was able to confirm that Jos would plan on being there too, a slight change from our originally-planned experts-only meeting. I believe they saw added benefit to having some political representation there as well (Dan and Jos), so as to help lay the framework for legal text that might be politically acceptable.

So, for EU it will be Jos Delbeke (HoU), Marianne Wenning (sinks in CC Unit), and probably Dieter Schoene (sinks expert in Development and the Environment Unit). I suspect that Anabela Gago-Filori, the US desk for DG Env, will also want to be there. Hope that helps you better plan for who should come from Washington.

**ACTION: EU asked what issues we would like to raise at the discussion, and what we think we might be able to accomplish. EU will be coming up with the same list here:..hopefully we'll have some intersecting goals.**

Also, think about how USEU can help foster this discussion...Anne mentioned to me that perhaps we could host a reception or dinner the night before? EU isn't planning a big luncheon on the 7th...Marianne said that a quick lunch in DG Env would probably be best. Also, in Amb Morningstar's absence, I'm sure John Cloud would like to get a readout from you before your departure for Paris if there's time (via TGV, Paris is about two hours away).

Please let me know if you have any immediate questions for me that need clarifying today. I will be out of the office next week, so if something urgent comes up, please speak with Anne Derse or my colleague Susan Driano. If not, I'll follow up on my return.

Thanks - Steve

Steven Mouton
US Mission to the EU
32-2-508-2670 (tel)
32-2-511-2092 (fax)
moutonsm@state.gov

-----Original Message-----
**From:** Bodansky, Daniel M (OES)
**Sent:** Thursday, February 15, 2001 3:35 PM
**To:** Mouton, Steven M(Brussels); Nyman, Elisha E(Main State); Talley, Trigg (OES)
**Cc:** Breidenich, Clare R (OES); Miotke, Jeffery A (OES); Wickwire, Susan X (OES); 'cbreidenich@yahoo.com'; Derse, Anne E (Brussels)
**Subject:** RE: Sinks/Environment Council

March 7 sounds good. Do you know what level people the EU is thinking of sending? I'll be in Rome on March 6 for the G-8 climate change meeting, and could easily stop in Brussels on the 7th, if the EU heads of del (such as Jos and Peter Betts) will attend the sinks meeting together with their technical experts. In my view, having both at the meeting might be desirable, since we've actually had relatively good cooperation at the technical level on sinks; the problem has been in translation from the technical to the political level.

-----Original Message-----
**From:** Mouton, Steven M
**Sent:** Thursday, February 15, 2001 6:15 AM
**To:** Nyman, Elisha E(Main State); Talley, Trigg (OES)(ENV)
**Cc:** Breidenich, Clare R (OES)(EGC); Miotke, Jeffery A (OES)(EGC); Wickwire, Susan X (OES)(EGC); Bodansky, Daniel M (OES)(FO); 'cbreidenich@yahoo.com'; Derse, Anne E
**Subject:** RE: Sinks/Environment Council

How does March 7 (Wed) sound?

We couldn't have sinks talks earlier in the week, because there will be a G8 climate change experts group meeting (Rome, I think) on the 6th, following the March 2-4 G8 Ministers mtg. I expect that we might have someone at this G8 experts meeting too, but not sure if it would be all the right people for a bilat...Jos Delbeke will be there for EU (no confirmation on anyone else).

Thus, March 7 looks like our best option right now. Commission agreed that holding talks before the March 8 informal env council would be most useful, and didn't feel that the 7th was too late. Alternatively, we could go earlier...they proposed Feb 27, but we suspect that you wouldn't want to have to come to Europe two times so close together.

So, are we a go on the 7th? We told them we'd ask you about these two options. Give a call if you'd like to discuss this in more detail or other options. Thanks! Cable to follow. - Steve

Steven Mouton
US Mission to the EU
32-2-508-2670 (tel)
32-2-511-2092 (fax)
moutonsm@state.gov

-----Original Message-----
**From:** Nyman, Elisha E
**Sent:** Wednesday, February 14, 2001 5:24 PM
**To:** Talley, Trigg (OES)(ENV); Mouton, Steven M(Brussels)
**Cc:** Breidenich, Clare R (OES)(EGC); Miotke, Jeffery A (OES)(EGC); Wickwire, Susan X (OES)(EGC); Bodansky, Daniel M (OES)(FO); 'cbreidenich@yahoo.com'
**Subject:** RE: Sinks/Environment Council

Thanks Trigg. Let's see what USEU says as to "bigness" of the advantage for 3/5. From where I sit, Monday probably would be preferable, since this gives them a day more coordination time before the meeting on 8th, but I understand Clare's logistical issues.
Ned

-----Original Message-----
**From:** Talley, Trigg (OES)
**Sent:** Wednesday, February 14, 2001 10:51 AM
**To:** Nyman, Elisha E(Main State); Mouton, Steven M(Brussels)
**Cc:** Breidenich, Clare R (OES); Miotke, Jeffery A (OES); Wickwire, Susan X (OES); Bodansky, Daniel M (OES); 'cbreidenich@yahoo.com'
**Subject:** Sinks/Environment Council

Steve, Ned -- It looks like it will be difficult to get anyone over on our side to meet with the EU on sinks before the week of March 5. We have people (including Clare Breidenich, who's handling sinks here) going over for an OECD meeting on the 8th and 9th. The best dates for the meeting would be that week, if that works for the EU folks. Unless you think that holding on Monday is a big advantage from the standpoint of reporting back, I'd propose the 6th or the 7th. Alternatively, the following week could work as well (although I'd like to make sure that Clare is comfortable staying over the weekend first). I know that this is not ideal timing for the Environment Council meeting; but it may be that we can use the fact that we're scheduling an experts meeting in train to forestall any further decisions in the short term. Dan Bodansky will be sending an e-mail to Bo Kjellan to make this point.

THE NEW YORK TIMES, FRIDAY, FEBRUARY 16, 2001

# Bush Team Under Attack on Emissions Talks

By ANDREW C. REVKIN

The Bush administration is only slowly turning to climate issues and so is being left on the sidelines in international talks that could shape a treaty curtailing global warming, say government officials and executives involved in the discussions.

At the administration's request, United Nations officials agreed on Monday to delay the next round of formal treaty negotiations, earlier set for May, until June or July.

But other meetings and informal international discussions that could significantly shape the final agreement are taking place weekly, and the treaty is expected to be a central topic at a meeting of environment ministers from the Group of 8 industrialized nations that begins in Trieste, Italy, on March 2.

The State Department thanked the United Nations on Tuesday for agreeing to the delay in climate-treaty bargaining, and said it would "shortly begin a review of its policy toward the international climate change negotiations."

But critics, who include industry executives and some environmental lobbyists, say the administration is betraying a lack of urgency. "Damage is being done right now," said a Washington lobbyist for foreign oil exporters, who spoke only on condition of anonymity. "Although efforts have been made to alert the administration that there's a whole bunch of stuff going on, there doesn't seem to have been a disciplined effort to cope with that circumstance."

Oddly, it is not environmental campaigners who have expressed the most impatience, even though new scientific reports have shown the strongest link yet between recent warming and rising emissions of greenhouse gases.

Rather, the frustration is coming mainly from some Republican officials and representatives of energy-related businesses, who see huge costs resulting from the climate treaty, named the Kyoto Protocol for the Japanese city where its outlines were negotiated in 1997.

These critics say the administration has essentially been mute in the face of day-to-day events including informal planning sessions for this summer's negotiations that took place at the United Nations last week. An influential scientific advisory panel that issued the recent reports strengthening the tie between warming and emissions is also releasing reports next Monday in Geneva and later this month in Accra, Ghana, and the final wording of such reports is often influenced by comments offered by governments.

Some people who oppose the Kyoto agreement say the scientific reports, by the Intergovernmental Panel on Climate Change, a body operating under United Nations auspices, are tending toward the sensational in hopes of energizing efforts to complete the treaty.

One senator involved with the issue, Chuck Hagel, a Nebraska Republican who sees warming as a significant problem but has been critical of the treaty, said both the right and the left should give Bush administration officials more time. "Everyone should throttle down and back a little bit," he said in an interview. "These guys are going to get their arms around this. They understand this is an important issue."

The Kyoto Protocol has been signed by more than 100 countries but has not been ratified by any industrialized nation. Its final adoption would require the United States and three dozen other industrialized countries to cut combined emissions of greenhouse gases by 2012 to 5 percent below their 1990 levels. The United States, which produces a fourth of the world's emissions with 5 percent of the world's population, stands to be affected most by any final agreement. Bargaining broke down in November at The Hague, where the European Union rejected a compromise on sticking points that was offered by the United States, Canada, Japan and several other negotiating partners.

In a turnabout from a spate of recent criticism of President Bush on other conservation matters, some environmental groups are giving him more room this time around, saying the complaints from conservative corners may be intended to prompt him to discard quickly the years of work invested in the treaty.

They do say they are irked that Mr. Bush, quick to create a high-level team to develop new sources of oil and other fossil fuels, has not made any announcements about how the country will deal with the emissions from burning those fuels.

But with regard to the treaty, at least, no news is good news, said Eileen Claussen, president of the Pew Center on Global Climate Change. Ms. Claussen and some other environmentalists point to several moves that imply the administration is going to take the treaty seriously. For example, Ian Bowles, the senior director for environmental affairs at the National Security Council during the Clinton administration, has been retained for the time being by the Bush team.

There is a decent chance, environmental groups say, that upon reflection Mr. Bush will see merits in taking a historically aggressive stance on a strategic issue — in this case the global environment — in much the same way another Republican president, Richard M. Nixon, did when he went to China.

"I'd rather that they be thoughtful about it before they make up their mind," Ms. Claussen said, "rather than rush to judgment, particularly if it's the wrong judgment."

THE SECRETARY OF COMMERCE
Washington, D.C. 20230

01 FEB 21 AM 9:52

February 16, 2001

The Honorable Chuck Hagel
U.S. Senate
Washington, D.C. 20510

Dear Senator Hagel:

I am pleased to provide you with a copy of the Intergovernmental Panel on Climate Change's (IPCC) Summary for Policymakers that accompanied the IPCC's "Climate Change 2001: The Scientific Basis" report which was issued in January. On February 19, the IPCC plans to release the Summary for Policymakers for its report "Climate Change 2001: Impacts, Adaptation and Vulnerability." This report will be available through the IPCC's site: http://www.ipcc.ch.

The IPCC report is the culmination of several years of work by hundreds of scientists and technical experts from universities and government organizations around the world, including the Department of Commerce, to assess the scientific literature related climate change and its potential global impact.

The enclosed document is the first of three reports that the IPCC is issuing in early 2001. Scientists from the Department's National Oceanic and Atmospheric Administration, including facilities in Colorado, North Carolina and New Jersey, played key roles in reviewing the science, contributing their expertise and authoring this first summary document.

As we work together on issues of climate change in the 107th Congress, I know the IPCC's work will promote tremendous dialogue amongst policymakers. The Department's outstanding scientists and I look forward to working with you to gain a better understanding of the issues surrounding climate change, in order to ensure that our policy decisions are rooted in sound science.

Thank you for your continued interest in the people and programs of the Department of Commerce.

Warm regards,

Donald L. Evans

Enclosure

**March 5, 2001**

**Chart Produced by the Energy Task Force Lead By Vice President Richard Cheney**

**RE: Foreign Suitors For Iraqi Oilfield Contracts**

# Foreign Suitors for Iraqi Oilfield Contracts

**as of 5 March 2001**

| Country | Firm | Iraqi Oil & Gas Projects | Comments/Status |
|---|---|---|---|
| Algeria | Sonatrach | Tuba | Discussions. PSC. |
| | | Blocks 6 & 7 | Collecting data. |
| Australia | BHP | Halfaya | Discussions. PSC. |
| | | Block 6 | Collected data. |
| Belgium | Petrofina | Ahdab | Technical/economic studies (China's CNPC awarded PSC). |
| | | Block 2 | Collected data. |
| Canada | Ranger | Block 6, other | Signed MOU with Baghdad. |
| | Bow Canada | Khurmala | Joint proposal w/Czech Republic's Strojexport |
| | | Hamrin | Joint proposal w/Czech Republic's Strojexport |
| | Alberta Energy | Unidentified | None |
| | CanOxy | Ratawi | Discussions. PSC. |
| | | Block 5 | Collected data. |
| | Chauvco Res. | Ayn Zalah | Advanced talks by late 1996. Service contract for advanced oil recovery (gas injection project) in this aging field. |
| | Escondido | Ratawi | Discussions. PSC. |
| | | Block 5 | Collecting data. |
| | Talisman | Hamrin, E. Baghdad | Service contract negotiations October 1999. |
| | IPC | Hamrin | Discussions. Service contract. |
| | PanCanadian | Unidentified | None |
| China | CNPC | Ahdab | Production Sharing Contract (PSC) signed June 1997. |
| | | Halfaya | Bid for $4 bn, 23-year PSC. |
| | | Luhais & Subba | Discussions. Service contract. |
| | | Block 5 | Collected data, discussions. |
| | Norinco | Ahdab | PSC signed June 1997 (CNPC consortium partner). |
| | | Rafidain | Discussions. PSC. |
| | Sinochem | Rafidain | Discussions. PSC. |
| Czech Republic | Strojexport | Hamrin | Joint project with Bow Canada. Sent team to Iraq in Sept 1997. |
| | | Khurmala | Joint project with Bow Canada |
| Finland | Neste Oy | Unidentified | None |
| France | Total Elf Aquitaine | Majnoon | PSC "agreed in principle" January 1997. |
| | Forasol SA | Saddam | Feasibility study presented to Baghdad in 1997, updated in 1998. |
| | IBEX | Hamrin | Technical discussions. |
| | Perenco | Rafidain | Discussions. PSC. |
| | Total Elf Aquitaine | Nahr Umr | PSC "agreed in principle" January 1997. |
| Germany | Deminex | Block 1 | Collected data. |
| | Preussag | Ahdab | Technical/economic studies (China's CNPC later awarded PSC). |
| | | Block 2 | Collected data |
| | Slavneft | N. Rumaylah | Subcontractor to Lukoil consortium. |
| Greece | Kriti | Gharraf | Discussions. PSC. |
| Hungary | Hanpetro | Block 3 | Collected data. |
| India | ONGC | Tuba | Advanced contract talks in October 1999 (ONGC drilled at least four wells in Tuba in the 1980s). PSC. |
| | | Halfaya | Discussions. PSC. |
| | | Block 8 | Collected data. |
| | Reliance | Tuba | Discussions. |
| Indonesia | Pertamina | Tuba | Finalized discussions for a PSC in late 1997. |
| | | Block 3 | Collected data |
| Ireland | Bula | Block 4 | Discussions. |
| Italy | Agip | Nasiriya | PSC initialed Apr 97. $2 bn, 23-year project (w/partner Repsol). |
| | | Iraq-Turkey gas pipeline | Discussions. |
| | | Block 1 | Collected data, discussions. |
| | Snamprogetti | Luhais & Subba | Discussions. Service contract. |

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| Country | Firm | Iraqi Oil & Gas Projects | Comments/Status |
|---|---|---|---|
| Japan | Japex | Gharraf | Bid and technical/economic oilfield study submitted to Baghdad. March 1997. PSC. |
| | Mitsubishi | Luhais & Subba | Discussions. Service contract. |
| Malaysia | Petronas | Ratawi | Discussions. PSC. |
| | | Tuba | Discussions. PSC. |
| | | Block 2 | Collected data, discussions |
| Mexico | Pemex | Unidentified | None. |
| Netherlands | Larmag | Subba & Luhais | Discussions. Service contract. |
| | Dutch Royal Shell | Ratawi | Discussions. |
| | | Block 8 | Collected data. |
| Norway | Statoil | Block 1 | Collected data. |
| Pakistan | Crescent | Ratawi | Discussions. PSC. |
| | | Block 5 | Collected data. |
| Romania | Petrom | Khurmala Dome (Karkuk) | Apparently awarded service contract, project in advanced technical infrastructure design phase (setting equipment & materials specifications for project). |
| | | Luhais & Subba | Discussions. Service contract. |
| | | Block 4 | Collected data, discussions. |
| | | Qayyarah | Contract talks. Service contract for well drilling and engineering. |
| | Mol | Block 3 | Discussions. |
| Russia | Kond Petroleum | Rafidain | Discussions. Russian firm Sidanko a possible partner. PSC. |
| | Lukoil | W. Qurnah | PSC signed March 1997. Topographic surveys in 1998. |
| | | N. Rumaylah | Service contract negotiations to upgrade water injection facilities, develop additional geologic reservoirs. |
| | Zarubezneft | W. Qurnah | PSC signed March 1997 (Lukoil consortium partner). |
| | | N. Rumaylah | Service contract negotiations (w/Lukoil consortium). |
| | | Hamrin | Invited to bid in mid-1997. Service contract. |
| | Mashinoimport | W. Qurnah | PSC signed March 1997 (Lukoil consortium partner). |
| | | Luhais, & Subba | Discussions. Service contract. |
| | | N. Rumaylah | Service contract negotiations (w/Lukoil consortium). |
| | Tatameft | N. Rumaylah | Subcontractor to Lukoil consortium. |
| | Rostneft | N. Rumaylah | Subcontractor to Lukoil consortium. |
| | Sidanko | N. Rumaylah | Subcontractor to Lukoil consortium. |
| S. Korea | Sangyong | Halfaya | Bidding for $4 bn, 23-year PSC. Seoul in June 1997 invited Iraq Oil Minister to S. Korea for signing ceremony. |
| | Samsung | Halfaya | Bidding (part of Korean consortium). PSC. |
| | Pedco | Halfaya | " " " |
| | Hambo | Halfaya | " " " |
| | Yukong | Halfaya | " " " |
| | Daewoo | Rafidain | Discussions. PSC. |
| Spain | Repsol | Nasiriya | PSC initialed Apr 97. $2 bn, 23-year project (w/partner Agip). |
| | | Block 4 | Collected data. |
| Taiwan | CPC | Gharraf | Discussions. PSC. |
| | | Rafidain | Discussions. PSC. |
| | | Tuba | Discussions. PSC. |
| Tunisia | Setcar | Unidentified | None |
| Turkey | TPAO | Gharraf | Bid for PSC. Oilfield study completed January 1997. |
| | | Mansuriya Gas Field | Service contract signed May 1997 to develop field, purchase gas. |
| | | Block 4 | Reprocessed seismic data, conducting laboratory studies. |
| UK | Branch Energy | Gharraf | Discussions. PSC. |
| | Pacific Resources | Rafidain | Discussions. PSC. |
| Vietnam | PetroVietnam | Amara | Service contract. Near signing Oct 1999 |

35AS0713

**March 5, 2001**

**Memorandum From: Peter R. Fisher**

**To: Secretary of the Treasury, Paul O'Neill**

**RE: Meeting with President Bush and Vice President Cheney on Corporate Governance**

**MEMORANDUM**

**TO:** Secretary O'Neill
**FROM:** Peter R. Fisher
**DATE:** March 5, 2002
**SUBJECT:** Discussion of Corporate Disclosure Issues

This morning I attended a meeting with the President and Vice President and White House staff in the Oval Office to discuss the attached memorandum as the basis for a discussion of the speech being drafted for the Baldridge Awards.

The memo tracks a document that Marc Sumerlin had been preparing with our input as well as considerable input from the SEC. Yesterday, I expressed concern that the numbered proposals were too specific for guidance for a speech that I hoped would set aspirational goals for corporate America. The document also lacks the "cross-certification" idea for auditors; Marc suggested that others had strongly resisted this (perhaps through misunderstanding that it would require auditors to know what is going on inside the CEO's head).

Lindsey led the discussion walking through the numbered items. Both the President and Vice President had some difficulty with Proposal # 3 in the first section, fearing that it would set too high a standard for CEO's and would lead to excessive litigation. Efforts to explain that Pitt thinks of this as creating a safe harbor for CEO's who create reasonable procedures to inform themselves and their shareholders were not convincing. The President also expressed concern about proposal #4 (auditors to assess controls against best practice) in the last section but seemed to accept that this was not intended for public consumption but for Board responsibility.

I did not attempt to argue about the individual proposals but, rather, tried to press the case that the President's speech should focus on what we expect of corporate leaders. I suggested that while government can make some changes both to set better and better enforce minimum standards, the President should clearly distinguish the need for those in positions of public trust, like corporate leaders, to be held to the highest standards; that we should not accept the idea that the current challenge is principally one for government but is for *corporate* governance. Where there existed concern about whether a particular idea could be implemented by the SEC without creating excess litigation, I suggested that it be turned into part of the aspirational goals. The President reiterated this to the speechwriters; I believe Hubbard and Rove were comfortable with this approach.

Both the President and Vice President wondered whether the ideas reflected in the memo had been shared with "real" CEOs but ultimately, on the theory that the speech would not delve into details, we were discouraged from trying to test market these ideas this afternoon with select corporate leaders.

The Vice President had already read a draft copy of the speech and was clearly going to be taking a close review going forward. You may want to call him. I will be happy to answer any questions you may have.

C: Ken Dam, Tim Adams, David Aufhauser

9:25 Oval Office
March 5th, 2002

THE WHITE HOUSE

WASHINGTON

March 4, 2002

Information

MEMORANDUM FOR THE PRESIDENT

THROUGH: LARRY LINDSEY

FROM: MARC SUMERLIN

SUBJECT: CORPORATE GOVERNANCE

On Thursday, you are currently scheduled to give remarks on corporate governance at the Malcolm Baldrige Quality Awards. The Treasury, SEC, NEC and CEA have developed eleven specific proposals that you could call on the SEC to implement. The SEC believes it can implement almost all of these proposals without legislation, and Chairman Pitt would make subsequent recommendations to you if he needs additional legislative authority. These proposals would provide better information to investors, would make corporate officers more accountable, and would strengthen the accounting system.

I

**Providing Better Information to Investors**

Proposal #1: *Each investor should have quarterly access to the information needed to judge a firm's financial performance, condition, and risks.* Companies should be responsible for providing investors a true and fair picture of themselves, and this information should be provided in "plain English." Under this proposal, a company would disclose information in its control that a reasonable investor would find necessary to assess the company's value, without compromising competitive secrets. Today, disclosure practices have fallen behind the advanced techniques of corporate finance, allowing some firms to conceal the true risks faced by investors. And too many firms have mistaken GAAP compliance for proper disclosure.

Example: ABC, Inc. needs to raise $500 million. A Wall Street executive convinces the CFO that ABC can raise the money off balance sheet so that investors will not have to know about the company's new debt. The financial techniques are permitted under existing accounting rules, and hence are approved as off-balance-sheet financing by the external auditors. Under this proposal, the money could still be raised off balance sheet, but the company would be required to disclose the transaction to investors because it impacts the overall financial condition of the company.

Proposal #2: *Each investor should have timely access to critical information.* Under this proposal, the SEC would expand the list of significant events requiring prompt disclosure. In

addition, CEOs would be required to disclose promptly any other information that is critical to their decision-making or their understanding of the true state of affairs of the company.

Example: Moody's, a reputable credit rating agency, informs ABC, Inc. that its credit rating will be lowered at the end of the quarter even if ABC performs well. This downgrade will make it more expensive for ABC to borrow money. Under this proposal, ABC would be required to issue a report within two days that alerts investors to the impending downgrade.

Proposal #3: *CEOs must make the disclosure of critical information a top priority.* Under this proposal, CEOs must ensure that reasonable procedures are in place to ensure that the information needed to judge the firm's financial performance, condition, and risks are brought to their attention. This requirement will ensure that CEOs themselves are aware of major developments – and they will have an obligation to disclose them.

11

**Making Corporate Officers Accountable**

Proposal #1: *CEOs should personally vouch for the veracity, timeliness, and fairness of their company's public disclosures, including its financial statements.* This proposal would make CEO's personally attest each quarter and annually that the financial statements and company disclosures accurately and fairly disclose the information that a reasonable investor needs to make an informed investment decision. Currently, CEOs typically sign only a bare-bones statement regarding the annual financial statements.

Example: A CEO is given an annual financial statement to sign, which includes a statement that he is "duly authorized" to sign the forms. Under this proposal, the statement that the CEO is asked to sign would be modified to say something like: "I personally attest to the truthfulness and adequacy of this information." As a result, the CEO is more likely to ask tough questions about the information before him.

Proposal #2: *CEOs should not be allowed to profit from erroneous financial statements.* Under this proposal, CEO bonuses or other incentive-based forms of compensation would be disgorged in cases of serious misconduct.

Proposal #3: *CEOs or other officers who clearly abuse their power should lose their right to serve in any corporate leadership positions.* This proposal, which would require legislation, would allow the Securities and Exchange Commission to ban individuals from serving as executives or directors of publicly held corporations if they engage in serious misconduct. At present, the SEC needs to seek court approval in certain types of cases.

Proposal #4: *Corporate leaders should be required to tell the public whenever they buy or sell company stock for personal gain.* This proposal would cause companies to disclose significant transactions involving officers' and directors' purchase and sale of the company stock within two business days of execution. Currently, corporate leaders can go as long as a year or more without disclosing their personal transactions with the company and as long as 40 days for open market transactions.

III

## Developing a Stronger, More Independent Accounting System

Proposal #1: *Investors should have complete confidence in the independence and integrity of the auditors.* Under this proposal, the SEC would establish guidelines for the audit committees to prohibit an external auditor from performing any other services to an audit client, if the service compromises the independence of the auditor. Under no circumstance could an audit firm simultaneously perform internal and external audits for the same client. The client would also be forced to disclose in greater detail all fees paid to the auditing firm and its affiliates. Finally, the audit committees themselves would be required to choose the auditor each year and propose its selection to the shareholders.

Proposal #2: *An independent regulatory board should ensure that the accounting profession is held to the highest ethical standards.* Under this proposal, an independent, private-sector board would be established, under the supervision of the SEC, to develop standards of professional conduct and competence. This board would have the ability to monitor, investigate, and where needed, enforce its ethics principles by punishing individual offenders.

Proposal #3: *The authors of accounting standards must be responsive to the needs of shareholders.* Under this proposal, the SEC would exercise more effective and broad oversight of the standards board, insure its independence, and require prompt promulgation of standards that reflect economic reality rather than compliance with technical requirements. This change would help ensure that the accounting standards are more responsive to the needs of investors, rather than based on the interests of professional accountants.

Proposal #4: *The firm's accounting system should be compared with the best, not simply against minimum standards.* Under this proposal, auditors would be required to compare the quality of a company's financial controls with the best practices of the industry and communicate its findings to the audit committee. The audit committee would be obligated to discuss these findings and the improvement of practices with management, the Board of Directors, and the auditor, and to act independently to require improvement where necessary.

**March 6, 2001**

**Memorandum From: EPA Administrator Christie Todd Whitman**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: Message to President Bush regarding Global Warming - Kyoto Protocol**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

# FACSIMILE TRANSMISSION

OFFICE OF
THE ADMINISTRATOR

**TO:** Secretary O'Neill

**FROM:** Administrator Whitman

**COMMENTS:**

FYI

**PAGES IN THIS TRANSMISSION, INCLUDING COVER SHEET:** 10

**DATE:** 8/6 **TIME:** 5:00 P.M.

**Office of the Administrator**
**1200 Pennsylvania Avenue, NW**
**Room 3000 Ariel Rios North**
**MC 1101A**
**Washington, D.C. 20004**

**Facsimile: (202)501-1450; Telephone (202)564-4700**

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I would strongly recommend that you continue to recognize that global warming is a real, and serious issues.

While not specifically endorsing the targets called for in Kyoto, you could indicate that you are exploring how to reduce U.S. Greenhouse gas emissions internally and will continue to do so no matter what else transpires.

Mr. President, this is a credibility issue (global warming) for the U.S. in the international Community. It is also an issue that is resonating here, at home. We need to appear engaged and shift the discussion from the focus on the "K" word to action, but we have to build some boneifides first.

We did win some issues at this meeting i.e., recognizing cost, promoting children's health, and fending off some last minute end runs by the Germans and Japanese.

I'm available to discuss this further if you want.

**Gordon, Susan C (OES)**

From: Koenig, Steven F (OES)
Sent: Monday, March 05, 2001 10:39 AM
To: OES Team Climate

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BNA

International Issues
Clinton Positions No Starting Point
For Climate Talks, Whitman Tells NGOs

TRIESTE, Italy--Positions taken by the Clinton administration in climate change talks that were suspended in November 2000 are not the Bush administration's starting point for resuming talks, Environmental Protection Agency Administrator Christine Todd Whitman said March 2.
Whitman confirmed that the United States, which is responsible for about a quarter of the world's greenhouse gas emissions, would participate in the talks when they resume in July, but she dashed hopes that they would continue from where they left off in November. She spoke to nongovernmental organizations at the first day of talks among Group of Eight environment ministers, which are set to run through March 4.

"That we are engaged in this meeting [in Italy] and in July [when climate talks resume in Bonn] does not indicate that there is an acceptance of what occurred at The Hague and that we are moving forward from that point," Whitman said.

The November 2000 talks in The Hague broke down due to a rift between the U.S. and the European Union about the role to be played by so-called "carbon sinks," forests and other areas thought to absorb greenhouse gasses. The two sides were reportedly close to an agreement in the final hours of those talks before they broke down.

Officially, the G-8 talks here are aimed at paving the way for an agreement when the Sixth Conference of the Parties resumes global warming talks in July in Bonn (see related item in this issue), and ahead of meetings scheduled to commemorate the 10th anniversary in 1992 of the landmark Rio de Janeiro Earth summit in 2002 in South Africa.

However, all indications are that eyes in Trieste are on the U.S. delegation for clues about how easy it will be to work with them. Whitman attempted to assuage fears that President George W. Bush's heavily-criticized environmental record while governor of Texas meant that his presidential tenure would be bad news for the environment.

Jan Pronk, the COP-6 president and environment minister for the Netherlands, temporarily suspended the meetings, and he told reporters in Trieste on March 1 that they would be resumed July 16-27 in Bonn.

Canadian Views

Whitman seemed to confirm fears that the Bush administration could prove difficult to deal with on environmental issues. In the wake of Whitman's comments, David Anderson, the environment minister for Canada, told reporters that he feared the Bush administration would be far more problematic to deal with than Clinton's administration was. NGO representatives in Trieste gave Whitman's comments a mixed review at best.
When COP-6 resumes it will be aimed at agreeing on accounting standards for the 1997 Kyoto Protocol, which calls for worldwide greenhouse emissions to be slashed by 5.2 percent of 1990 levels between 2008 and 2012. The United States wants to be able to use the carbon sink credits and other flexibility mechanisms to reach the targets; the EU wants stricter end-of-pipe emissions cuts.

In an effort to open the door to such an agreement when the ministers gather in Bonn, NGOs asked Whitman for a commitment "to get back to the negotiating table and finalize the Kyoto Protocol." But she demurred.

World Wildlife Fund official Jennifer Morgan told BNA, "We continue to hope that regardless of what was said [by Whitman], what happened in The Hague will be a basis for countries to get together in Germany and finally reach an agreement."

Most observers said that Whitman's brief comments left many questions unanswered. One Italian economist who has worked with the U.S. delegation in Italy told BNA that Whitman may be more concerned about saying too much in Trieste than about leaving an incomplete picture.

That idea seemed to be played out by her staffers, who limited access to the former New Jersey governor, and deflected requests for clarification about Whitman's remarks.

The G-8 joins the United States, Britain, Canada, France, Germany, Italy, Japan--the world's seven largest industrialized economies--and Russia.

By Eric J. Lyman

Filed at 4:24 p.m. ET

TRIESTE (Reuters) - The world's top industrialized nations renewed a pledge to push ahead with a worldwide strategy to fight global warming Sunday, apparently overcoming doubts about the commitment of the United States.

Environmental activists welcomed the final statement of the Trieste meeting, saying the United States' partners in the Group of Eight had sent Washington a clear message that there should be no backtracking from previous accords.

After two days of closed-door talks in the Italian port, environment ministers said they would aim to finalize a 1997 pact signed in Kyoto, Japan, on cutting pollution. No G8 country has yet ratified the Kyoto agreement.

``We commit ourselves... to strive to reach agreement on outstanding political issues and to ensure in a cost-effective manner the environmental integrity of the Kyoto Protocol,'' the ministers said in a formal declaration.

The future of the historic pact was thrown into doubt at a United Nations conference in The Hague in November, when developed nations failed to settle the rules on how countries should meet the pollution targets they agreed in 1997.

The G8 statement said the top industrial countries would strive for an agreement when those talks resume in Bonn in July.

``A successful outcome at (Bonn) is necessary to allow early entry into force of the Kyoto Protocol. For most countries this means no later than 2002,'' the statement said.

The statement appeared to scotch any lingering doubts that the United States would turn its back on a pact that new President George W. Bush called unfair to America during his election campaign.

The Hague talks sank because of differences between the European Union, which insists on a minimum level of cuts in the domestic pollution created by each country, and the United States, Canada, Japan, Russia and others which want maximum use of ``flexible mechanisms.''

The Trieste statement reiterated that countries should achieve the bulk of their emissions reductions through cuts at home, rather than by buying the right to pollute from other countries and via other flexible mechanisms.

``We commit to take the lead by strengthening and implementing national programs and actions to reduce greenhouse gas emissions,'' the G8 countries, which together produce more than half of the world's pollution, said.

The Kyoto protocol called for industrialized countries to cut their emissions of six gases, principally carbon dioxide, by an average 5.2 percent of 1990 levels by 2010. The United States agreed to cut emissions by 7.0 percent.

ENVIRONMENTAL ACTIVISTS PLEASED

Environmental activists said the statement was better than expected and that Christine Todd Whitman, head of the U.S. Environmental Protection Agency (EPA) had provided a clear and welcome signal to G8 partners that Washington was serious about global warming.

"The bridge has been built among the world's greatest polluters to pave the way for the conclusion of the Kyoto Protocol this summer," said Jennifer Morgan, director of the World Wildlife Fund's Climate Change Campaign.

"Ministers have sent a clear message that they hear the warnings of scientists and are ready to act," she said.

A U.N. scientific panel has said the average global temperature is likely to rise by between 1.4 and 5.8 degrees Celsius (2.5-10.4 Fahrenheit) over the next 100 years.

Such a change in temperature -- which many scientists believe is being caused by pollution trapping heat in the atmosphere -- would mean widespread droughts and floods and massive economic and natural damage, experts say. Sea levels could rise by as much as 88 cm (35 inches).

Feared violence by anti-globalization protesters failed to materialize in Trieste, perhaps because of a massive police presence.

Saturday night demonstrators staged a loud but mostly peaceful protest, throwing colored smoke bombs and sending flares into the sky over the heads of security forces.

## EPA Chief's Plan To Review Global-Warming Pact Worries Environmentalists

***Associated Press***

Activists Want U.S. To Adhere To Emissions-Reduction Plan From 1997 Kyoto Protocol

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## European News

← previous page

# G8 countries pledge to seek deal on global warming

By Vanessa Houlder, Environment Correspondent
March 5, 2001

Environment ministers from the world's leading industrialised powers signalled their determination to rescue the international effort to curb global warming, which collapsed during an acrimonious set of talks in The Hague last November.

At a three-day meeting in Trieste, the ministers from the G8 countries, which are the seven leading industrialised nations and Russia, unanimously expressed "concern about the seriousness" of global warming.

They said they would "strive to reach agreement" in July in Bonn at the next set of talks on the Kyoto Protocol, the 1997 treaty on countering climate change that introduced legally-binding targets for reducing emissions of greenhouse gases.

Delegates said they were encouraged by the positive mood of the meeting. In particular, they were impressed by the stance taken by Christie Whitman, head of the US delegation, who calmed fears that the US would ignore the problem of global warming.

Ms Whitman, who heads the US Environmental Protection Agency, said the new Bush administration needed time to assess its policy on the Kyoto Protocol. "The president has said global climate change is the greatest environmental challenge that we face and that we must recognise that and take steps to move forward," she said.

Delegates had been "pleasantly surprised" by the stance taken by the US delegation, said Jennifer Morgan of the World Wildlife Fund, the conservation group. She said that the G8 partners of the US had sent a clear message about the importance of US participation in the global effort to combat global warming.

But there is no indication of how the gap between the US and the EU on policy towards the Kyoto Protocol will be bridged.

While the US has stressed the importance of making the Kyoto Protocol as flexible and cost-effective as possible, the EU has argued that the US approach would lead to insufficient cuts in greenhouse gases.

The EU, which rejected a compromise proposal from the US at the meeting in The Hague because it affected the environmental integrity of the Kyoto Protocol, may face even tougher negotiating demands from the Bush administration.

President George W. Bush stated his opposition to the Protocol during his election campaign, on the grounds that it would impose excessive costs on the US.

The Trieste meeting took place in the wake of the publication of the latest studies from the International Panel on Climate Change, the UN-sponsored group that advises policymakers.

These underlined the threat posed by global warming to large parts of the planet, by warning that temperatures could rise by 1.4°-5.8° centigrade this century.

The IPCC will on Monday call on governments to make an early transition to climate-friendly economies when it publishes an assessment of the technology and policy options for reducing greenhouse gas emissions.

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# Trieste, the hot topic for the G8 is climate change

ff in Milan
March 2 , 2001

**Delegates arriving for an international conference in Italy are hoping to put their past problems behind them and try to find common ground on environmental issues.**

G8 environment ministers are meeting in Trieste, Italy, today for initial talks on a climate change agreement which proved elusive last November at an environment summit in The Hague. The summit will last three days. The Hague talks largely failed after the U.S. and EU failed to find a compromise on how to tackle global warming.

The next international push to find agreement is due to start on July 15 in Bonn, Germany.

One of the key players is the U.S. Environmental Protection Agency head Christine Todd Whitman, former Republican Governor of New Jersey, who said the U.S. was ready to work with the EU to create a clean environment.
The Hague talks collapsed amid disagreements over the Kyoto environmental accord, negotiated in 1997, which calls for all industrialised nations to cut emissions of greenhouse gases, including carbon dioxide, by a little over five percent by 2010. Ministers from the world's seven largest Western industrialised nations and Russia (the solo called G8) will attend the three-day Trieste meeting.

Dutch Environment Minister Jan Pronk, who chaired the Hague summit, and the EU's environment Commissioner Margot Wallstrom will also be in Trieste. "I'm very hopeful that these will be positive talks and that we can move things forward," Wallstrom said.

But Italian Environment Minister Willer Bordon was more cautious, saying he hoped for some progress on implementing the Kyoto accord, although he did not expect any definitive decisions.

**March 13, 2001**

**Secretary of the Treasury Paul O'Neill's Daybook**

**Re: Proposed Tax Cuts - Meeting With Senators**

SECRETARY O'NEILL'S DAYBOOK FOR WEDNESDAY, MARCH 14, 2001

1. BREAKFAST WITH SENATOR KENNEDY
2. MEETING WITH BYRON DORGAN
3. LUNCHEON WITH SECRETARY POWELL, DR. RICE, SECRETARY RUMSFIELD AND DR. LINDSEY
4. MEETING WITH CENTRISTS

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

ASSISTANT SECRETARY

MEMORANDUM FOR SECRETARY O'NEILL

From: John M. Duncan JD for JD
Assistant Secretary
(Legislative Affairs)

Subject: Breakfast with Senator Kennedy

**Background:**

You are scheduled to meet with Senator Kennedy on Wednesday, March 14, at 8 am for Breakfast to discuss, from an intellectual standpoint, health care issues in general. The discussion is not expected to cover any specific legislative proposals or policy issues but more of a general discussion. This meeting came out of an informal discussion with the Senator.

**Analysis:**

In particular, Senator Kennedy staff has indicated that he would like to discuss your experiences at ALCOA and how they have affected your views on Health Care. He would like to talk about how some of those views relate to the ongoing debate on how our country should best approach Health Care. In particular he is interested to hear your thoughts on medical error reduction and quality improvement.

The Senator may also want to discuss how the nation's health care system interplay's with the economy. His staff has indicated that he is interested in discussing ways to make the health care system more efficient, especially the publicly financed portions, so that we can accomplish the national health care goals more effectively.

The issue of a prescription drug program under Medicare is the one issue that may come up that would be more of a legislative issue. Senator Kennedy may ask your views on the current debate over the various proposals.

Attachments:
Biography of Senator Kennedy

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

ASSISTANT SECRETARY

MEMORANDUM FOR SECRETARY O'NEILL

Through: John M. Duncan
Assistant Secretary
(Legislative Affairs)

From: Arthur E. Cameron, Jr.
Deputy Assistant Secretary
(Appropriations and Management)

Subject: Meeting with Byron Dorgan, Ranking Member, Senate Appropriations Subcommittee on Treasury and General Government

**Background:**

You are scheduled to meet with Senator Byron Dorgan, Ranking Member of the Senate Appropriations Subcommittee on Treasury and General Government, on Wednesday, March 15, to briefly discuss Treasury Appropriations.

Senator Dorgan (D-ND) began his career in public service in 1969 when the Governor of North Dakota appointed him Tax Commissioner. Dorgan successfully ran for the at-large Congressional seat in 1980 where he served until his successful run for the U.S. Senate in 1992. Senator Dorgan is a staunch supporter of North Dakotans and as such, is a strong supporter of rural and small communities and occasionally crosses party lines to vote for, or against, legislation which could help, or hurt, North Dakota. As Co-Chair of the Democratic Policy Committee and being from the Dakotas, Senator Dorgan has close ties to Minority Leader Daschle and has, in the past, taken on the role of "point person" for Democratic positions. It is likely that he will continue this role in the 107th Congress.

Senator Dorgan also serves on the Commerce, Science, and Transportation Committee, the Energy and Natural Resources Committee, and the Indian Affairs Committee. You should note that Senator Campbell, Chairman of the Treasury Appropriations Subcommittee, is the Chairman of the Indian Affairs Committee.

**Analysis:**

Senator Dorgan is likely to congratulate you on your recent confirmation and express his desire to work with you on many issues under the jurisdiction of the Treasury Department. Senator Dorgan is likely to speak on a broad range of subjects, not limited to appropriations. He may wish to discuss the following issues with regards to appropriations:

**Funding for Treasury Law Enforcement**—Senator Dorgan would like to ensure that the law enforcement bureaus receive adequate funding to accomplish their missions. Law enforcement represents approximately 30% of the Department's appropriated budget. In addition, with the Subcommittee's support, Treasury law enforcement programs received a 24% increase in funding for FY 2001, the largest increase in three years.

**Funding for U.S. Customs Service on the Northern Border**—In December of 1999 there was an attempted breach of the northern border by an alleged terrorist. Customs detained the subject resulting in an increased political profile for Treasury law enforcement programs, especially Customs officers along the northern border. Customs quickly responded to the 1999 incident by redeploying staff from other locations to increase security at northern border ports of entry. For example, Customs changed the practice of using only remote video coverage of 15 North Dakota ports closed at night to staffing those ports 24 hours a day. Senator Dorgan exercises significant influence in securing support to improve Customs trade processing and enforcement operations, with a particular interest on northern border security.

In 1998 Customs enlisted Price Waterhouse Coopers to construct a staffing model, expecting that it would only be used to justify increases of as much as 85 percent over baseline (rather than to prescribe redeployment of existing staff.) Most congressional stakeholders have great interest in the RAM, expecting it to dictate substantial staff increases in many ports of entry and resolve conflicts among ports (and Congressional districts) about appropriate staffing allocations. Senator Dorgan may use the RAM to argue for increasing North Dakota port staffing. On a national scale, additions for every port would require a massive budget increase. OMB and Treasury's Management and Enforcement staffs have not approved the RAM because it does not account for potential staff savings from work process improvements, automation or other technology, and coordination with DEA, INS, and FBI.

**Funding for U.S. Customs Service's ACE program**—Senator Dorgan would like to see strong Administration support, in the form of full funding, for Custom's ACE program. By way of background, ACE is designed to replace the antiquated ACS system and is expected to cost $1.4 billion over 4 or 5 years. The struggle to bring ACE on line is well publicized and especially vexing to the trade community. This struggle required the Treasury Department to seek funds for ACS "life support," and received $123 million from the Congress for this "life support." In addition, with the Subcommittee's support we successfully secured $130 million to begin the modernization of Custom's trade processes without having to rely on an importer user fee proposed in the FY 01 Budget.

**U.S. Customs Air and Marine Interdiction**—Senator Dorgan is likely to express his support for full funding for the U.S. Customs Air and Marine Interdiction program. (Senator Dorgan is likely to believe that full funding is closer to $60 million.) As you know from the President's budget blueprint, the Customs budget request will include $35 million "to improve interdiction efforts against illegally imported drugs." These resources will be used to procure selected aircraft and marine vessels and enhanced surveillance and flight safety components. We believe that adopting a standardized approach to replacement of obsolete equipment will enhance the effectiveness of surveillance and interdiction operations. OMB and Treasury continue to work with Customs on developing a systematic, long term approach to fleet modernization in the Air and Marine program.

**U.S. Secret Service Funding for National Security Events**—The Secret Service is designated as the lead agency on all National Special Security Events (NSSE). The 2002 Winter Olympics is designated as a NSSE. Treasury's law enforcement bureaus are engaged in a number of activities in preparation for the 2002 Winter Olympic Games, however, their FY 2001 and FY 2002 budgets do not include funding specifically for 2002 Olympics preparations. Consequently, Treasury is seeking these funds from the Treasury Counter-Terrorism Fund to be used by the law enforcement bureaus to offset the cost of providing counter-terrorism support for the 2002 Salt Lake City Winter Olympic Games. Senator Dorgan is likely to believe that funds should be specifically requested for this purpose, rather than taken from other funding sources, especially the Counter-Terrorism Fund. The Senator is likely to mention that the FBI has funds designated in their budget for this purpose, whereas the Secret Service does not, however DOJ offset this increase in FBI funding through cuts in other DOJ programs.

**Pay Parity**—Senator Dorgan is a supporter of pay parity between military and civilian employees of the Federal Government. He believes that the disparity in the President's budget between the increase in civilian and military pay will leave significant needs unmet. His staff has indicated that they believe that there is at least a $60 million shortfall in pay in the Treasury Department alone.

**Funding for U.S. Customs Training Center in West Virginia**—In the FY 99 Treasury Appropriations process, Congress authorized a law enforcement training center in West Virginia. Since that time it has been determined that the Customs Service will operate the center but other law enforcement agencies will utilize the facility. Since this is a project that is very important to Senator Byrd, Ranking Member on the full committee, Senator Dorgan may mention it. If Senator Dorgan brings it up, we would suggest that you express your support for the project as an important part of ensuring that Treasury's law enforcement officers are among the best trained in the world.

Senator Dorgan may wish to discuss the following issues with regards to other areas of Treasury jurisdiction:

**The Administration Tax Plan**—We believe that you are already well prepared to discuss the specifics of the Administration tax plan. However, we suggest that when discussing this issue with Senator Dorgan you express your willingness to work with all Senators on this issue.

**Trade Policy**—Senator Dorgan may want to talk about trade policy in general, however, on this topic it is likely that he will hone in on the topic of trade deficits. One topic of interest to the Senator is the interaction between trade enforcement, i.e., U.S. Customs, and trade policy.

**Senator Dorgan's Fair and Simple "Shortcut" (FASST) Tax Form Proposal**—The FASST proposal would remove the necessity for approximately 60-70 million taxpayers to file an income tax return. The employer computing standard deductions based on information supplied by the worker, applying a 15% flat tax on the wages after deductions, and submitting the information to the IRS would accomplish this. The withholding tax that the employer submits to the IRS through the W-4 submission process would represent the actual tax liability of the employee. Once submitted the government would say "close enough," and close the books. (Please see attachment from Senator Dorgan's webpage for further information.)

**Interest Rates**—Senator Dorgan strongly believes that the Federal Reserve's policy of raising rates in recent years has had an unnecessary braking effect on the economy and has been detrimental to North Dakotans. He believes that the Federal Reserve's practices and their decision making process, which is not open to the public, should be opened up to much stricter scrutiny by the Congress and the Administration. It is likely that if the subject of interest rates comes up that he will ask your opinion on the issue of interest rate policy.

He may also express his support for the Golden Dollar that bears the image of Sacagawea, the Shoshone woman who accompanied Lewis and Clark on their expedition proving critical to the success of the mission. For your information, former Mint Director, Philip Diehl traveled to North Dakota in June of 1999 to participate in an event with Senator Dorgan relating to the Golden Dollar.

The Subcommittee has requested that you appear for a hearing on April 26th. We are currently working with the Subcommittee staff to ensure that this date fits well into your schedule and works well within this year's budget and appropriations process. This is unlikely to come up at the meeting because the majority staff usually handles scheduling of hearings.

Attachments (4):

Talking Points for Meeting with Senator Dorgan
Summary of FY 2002 Budget Request
Senator Dorgan's press release regarding the FASST program
Biography of Senator Dorgan

# TALKING POINTS FOR MEETING WITH SENATOR DORGAN

- I understand that your Committee has been supportive of Treasury's efforts to improve operations and meet continuing challenges in tax administration, law enforcement, and the many other Treasury core missions.

- I look forward to working with the Committee to balance Treasury's key programs against an environment of limited resources.

- This year's budget process is a bit different, but we will be working closely with the Committee on meeting Treasury and Committee goals within this broader process.

- [In response to law enforcement related issues] I share your commitment to the Treasury law enforcement bureaus and look forward to working with you as we work cooperatively to ensure that Treasury's law enforcement officers are the benchmark that all others are measured against.

- I would like to emphasize that I would like to have an open line of communication with this Committee. If you ever have an issue, no matter how small, with the Treasury Department you should always feel free to bring it up with me personally.

- Lastly, I would like to hear about some of the thoughts and concerns you may have about the Treasury Department so that I can focus on these as we work through the 2002 appropriations process.

## TREASURY LAW ENFORCEMENT HIGHLIGHTS

- ☐ Treasury remains **committed to the most prudent allocation of limited resources to accomplish critical law enforcement missions** for which we are responsible.

- ☐ Our law enforcement bureaus have grown, are better equipped, and have become more effective as a result of the Committee's oversight and support.

  - **Treasury Law Enforcement resources represent approximately 30 percent** of the Department's appropriated budget.

  - With the Committee's support, the Department received a **24 percent funding increase in FY 2001 for Treasury Enforcement programs**, the largest increase in three years.

## EFFORTS TO MEET NEW & CONTINUING LAW ENFORCEMENT CHALLENGES

- ☐ Each year, the Treasury Department's missions grow in complexity and scope. Major incidents, such as the December 1999 attempted breach of the northern land border by an alleged terrorist, increase the political profile of Treasury enforcement operations.

  - **NOTE: Senator Dorgan** exercises influence in securing support to improve Customs trade processing and enforcement operations, with a **particular interest on northern**

**border security.** He also will play a major role in funding allocations for Customs automation modernization, the centerpiece of which is the **Automated Commercial Environment (ACE).**

**Northern Border Resources**

- **Customs** quickly responded to the Port Angeles, WA incident by **redeploying staffing** from other locations to achieve heightened security at every northern land border port.
  - Customs abandoned the practice using only remote video coverage of 15 North Dakota ports closed at night. **They are now staffed around the clock.**
- This operation places additional strain on Customs' overtime budget for all the northern border locations.

**Resource Allocation Model (RAM) to Address Customs Staffing Along US Borders**

- In **1998 Customs enlisted Pricewaterhouse Coopers to construct a staffing model,** expecting that it would only be used to justify increases of as much as 85 percent over baseline (rather than to prescribe redeployment of existing staff).
- Most **congressional stakeholders have great interest in the RAM, expecting** it to dictate substantial staff increases in many ports of entry and **resolve conflicts among ports** (and Congressional districts) **about appropriate staffing allocations.**
  - **NOTE:** Senator Dorgan may use the RAM to argue for increasing North Dakota port staffing. On a national scale, additions for every port would require a massive budget increase.
- **OMB and Treasury's Management and Enforcement staffs have not approved** the RAM because it does not account for potential staff savings from work process improvements, automation or other technology, and coordination with DEA, INS, and FBI.

**Trade Enforcement and Facilitation**

- Customs' **struggle to replace its antiquated Automated Commercial System** (ACS) with ACE is well publicized and especially vexing to the trade community.
  - FY 2001 funding includes $123 million for ACS "life support."
- With the Committee's support, **last year we successfully secured $130 million to begin the modernization** of Custom's trade processes without having to rely on an importer user fee.
  - ACE is estimated to total about $1.4 billion over 4 or 5 years.
- We look forward to working with you to accommodate continued funding for ACE within the President's Budget.

# SUMMARY OF FY 2002 BUDGET REQUEST

## FY 2002 - A UNIQUE BUDGET REQUEST PROCESS

- Typical with the transition to a new administration, the **budget request process is delayed and condensed,** with the submission delayed from February to April.

- In addition, this year's FY 2002 process is **slightly unique** from prior change in Administrations:

  (1) Although Treasury provided an estimate of the Department's costs to maintain current services to OMB in November 2000, **OMB applied an automatic calculation method** (5.5% for pay and 2.0% for non-pay categories) to all Federal government agencies' FY 2001 financial plans **to estimate** each agency's **FY 2002 baseline requirements**.

  (2) **Instead of the traditional OMB budget process** to review, prioritize and approve agencies' requested FY 2002 initiatives, the Administration is undertaking a broad review of the overall budget and will be giving guidance to Agencies shortly.

  (3) In **late-February,** the **President will transmit his Blueprint and FY 2002 Budget Outline** to the Congress. This Blueprint will **become the basis for developing the complete**, detailed FY 2002 President's Budget **request** to Congress **scheduled for** submission in **early April**.

## RECAP OF FUNDING

- **FY 2001 - Enacted Appropriations: $13.997 Billion**

- **FY 2002** - January 16th **OMB Baseline Submission: 14.611 Billion** (excludes FY 2002 new initiative requests)

## FUNDING ISSUES

**(1) Maintaining Current Services**

- Maintaining our current program levels will be an important objective in the near term and in FY 2002 – we will be working with the Committee on meeting these needs.

**(2) Programmatic Issues** - We will be addressing in this process additional program needs of important needs that continue to face the Department

- **IRS Reform and Restructure Implementation** - Continued support for Organizational Modernization (modernization and reform remain top priority for Treasury) and staffing investments to restore, stabilize and strengthen tax compliance and customer service programs

- **ATF Firearms Enforcement** -- Continued support against youth crime and for other firearms enforcement programs.

- **Customs Modernization** - In FY 2001, the Department made great progress in receiving funding critical to the modernization of Customs' trade processes. This investment is crucial to the vitality of Customs' mission.

- **Secret Service Protection Efforts** - Support to address workload and staff retention issues for the Service.

- **Money Laundering** - Continued support for the Money Laundering strategy jointly implemented between Treasury and Justice

- **Counter-Terrorism** - Continued support for Treasury bureaus' participation with the Joint Counter-Terrorism Task Force.

- **Office of Foreign Assets Control** (Departmental Offices) - Support for counter-terrorism efforts and for the Foreign Narcotics Kingpin Designation Act mandating a global sanctions program targeting foreign narcotics traffickers and organizations.

# The Ultimate Tax Reform — The Fair & Simple "Shortcut" Tax Plan

by
U.S. Senator Byron L. Dorgan
(D-ND)

Millions of Americans recently completed the annual, frustrating, and costly ritual involved in meeting the April 15th deadline for filing a federal individual income tax return. Once again, this year, there were millions of frantic searches for W-2 forms and receipts, millions of late night trips to the post office to get returns postmarked before midnight.

More than a few of those Americans, I suspect, would leap for joy to learn they'd never have to file another individual federal tax return again. Sound too good to be true? Think again.

As Congress considers major tax reform, I think we ought to consider the ultimate reform: freeing up to 70 million working Americans from the requirement that they file a federal individual tax return. Of all the proposals I've seen, my proposal, the Fair and Simple Shortcut Tax, plan does the most to simplify the current system while still preserving a progressive and fair tax structure.

The current tax system has far too much clutter -- an unnecessary web of complexity that makes it difficult even for tax professionals to understand.

In 1995, individuals spent more than three billion hours and $50 billion trying to comply with the U.S. tax laws. In 1998 just the instructions for completing Form 1040 are likely to be 60 pages long. CCH, the nation's largest publisher of tax information, has a current loose-leaf guide for accountants that runs more than 35,000 pages, with 8,500 more added for 1998.

And that's after years of discussion about how to simplify the process.

My solution: forget simplifying the forms, just get rid of most of them. Here's how.

## NO NEED TO FILE A TAX RETURN

Under the present system, an employee declares deductions when he or she goes to work for an employer. That information goes on a Form W-4 and defines the amount of tax withholding from the employee's paycheck. Under my plan, most employees could elect at the start of the year to choose the Fair and Simple "Shortcut" (FASST) Tax Plan which would mean that they would not have to file a federal individual income tax return by April 15th the following year.

For the vast majority of Americans, (married couples with up to $100,000 in wage income and single filers up to $50,000) whose income

comes mainly from salaries or wages with $5,000 or less of outside income such as interest, dividend and capital gains ($2,500 for singes), there would be no need to file a tax return. Based on conversations with tax experts, I believe anywhere from 60-70 million taxpayers could be relieved from having to file an income tax return under this system.

With my plan, the employee would answer a couple of additional simple questions on their W-4 Form, such as, "Do you own or rent a home?"

The employer would then compute family deductions, factor a deduction for home mortgage interest, and determine the amount of federal income tax the employee will owe. Under this plan, the tax will be a flat rate of 15% on the wages after deductions.

The employer will file its W-4 information with the federal government, and the withholding tax that the employer submits to the federal government from that W-4 information will represent the actual tax liability of the employee. The employee would have no obligation to file a federal income tax return. The tax withheld would be the tax owed and the federal government would say, "close enough," and close the books. In the absence of fraud, the taxpayer is not going to have to worry about a future tax audit.

What if the employee believed too much money had been withheld? Or what if this shortcut system is a disadvantage for him or her? In that case, this system would give the employee the choice of filing an income tax return just as they do today. The current system would not go away; it would remain (hopefully, in a more streamlined form) for those who choose to use a more complicated system of meeting their tax obligation.

**TAXPAYER CHOICE**

What happens to other higher-income individuals, self-employed people, small and large businesses who would not be eligible to use this plan? Life is more complicated in these situations and it is difficult to craft a one-size-fits-all solution. But we can and should change the tax code to make filing much less complicated than it is today. For them I propose we change the complicated Alternative Minimum Tax (AMT). Let's get rid of the AMT for all businesses and individuals reporting $5 million or less in annual income. It produces little revenue for the U.S. Treasury at that level but it is a nightmare of complications for many taxpayers that can only be overcome by paying for professional help from a tax preparer.

My plan will also provide for a 50% tax credit for up to $500 in tax preparation expenses for those who cannot use the shortcut tax method but pay a tax preparer to help them file an electronic tax return.

Can we turn the shortcut tax plan into a reality? Can we seriously consider eliminating individual income tax filing requirements for 50-60 million taxpayers? Why not? Over thirty countries already use some kind of no-return system. The Fair and Simple Shortcut Tax plan has the following virtues:

- It allows taxpayers to make a choice. They can elect to use the new short-cut method which means they don't have to file a federal individual income tax return. Or they can continue to file under the current system.
- It preserves a progressive income tax system that has been instrumental in the economic growth and development of our

country.

- It preserves a home mortgage deduction, the child credit and other positive features of the current tax code. Flat tax and national sales tax proposals would eliminate those deductions and many more that people count on.
- It reduces the cost of compliance. If 60-70 million fewer tax returns are filed, imagine how much less it would cost to fund the system's administration.
- It provides for a modest exemption from tax for non-wage income for those who elect to use this plan.

Finally, the shortcut system is simple, fair and less costly for everyone . It addresses the very problems so many people want us to solve - simplifying the tax system for them.

Removing the requirement for most Americans to file an annual, federal income tax return is a good one. Unlike most ideas that sound too good to be true -this one will work.



# Sen. Byron L. Dorgan (D)

## Elected 1992; 2nd term

**In Washington:** From his position as North Dakota tax commissioner in the 1970s, then in the House for a dozen years and now from the bully pulpit of the Senate, Dorgan has been a contemporary echo of the prairie populism that swept his state in the early 1900s.

"People feel powerless," Dorgan once said, "and they feel powerless because they're preyed upon by bigger interests."

With its tolerance for lengthy orations, the Senate gives Dorgan ample opportunity to rail at the large and distant forces — corporations, foreign governments, international financial institutions — that, he says, care not a whit for the common folk. The North Dakotan is a strong public speaker who also comes across in person as passionate about his beliefs.

A true small-town boy, Dorgan was born in the small farming community of Regent. Other than a brief stint working for a Denver-based aerospace firm, he has spent virtually his entire career in government. At the age of 26, he became the youngest constitutional officer in North Dakota history when the governor appointed him state tax commissioner.

Republicans have branded Dorgan as too liberal for his state, although his voting record shows him to be a shade toward the conservative end of the spectrum among Senate Democrats. But the senator easily turned back a challenge in 1998, touting his success in winning aid for farmers and steering federal funds to North Dakota.

Dorgan expressed interest in taking his populist outlook to a Senate leadership post in the 106th, when the retirement of Minority Whip Wendell H. Ford of Kentucky left an opening. But with Tom Daschle of neighboring South Dakota serving as minority leader, regional pressures worked against Dorgan for the whip position, which ultimately went to Harry Reid of Nevada. At the beginning of the 106th Congress, however, Daschle appointed Dorgan assistant Democratic leader for policy and co-chairman of the Democratic Policy Committee.

Dorgan will occasionally break party ranks to support GOP proposals. He backed legislation to ban a procedure opponents call "partial birth" abortion and sided with Republicans trying to overturn a Clinton veto of that legislation. He joined Republicans in supporting the welfare overhaul measure that Clinton signed, and he voted for a Republican bill to crack down on illegal immigration.

One of Dorgan's top concerns is boosting airline service to rural areas. At the beginning of the 106th Congress, he teamed up with West Virginia Democrat John D. Rockefeller IV to introduce legislation that would give grants to small communities to help them attract better air service. "While [airline] deregulation has been a wonderful success for the people who travel between the big cities of the country, it has been an unmitigated disaster for most rural areas and small communities," Dorgan said.

One of Dorgan's most passionate concerns is seeing to it that the government provides adequate assistance to farmers. He won an appointment to the Appropriations panel's Agriculture Subcommittee in the 106th, which should help him steer more benefits to his rural constituents. "It is exactly where you want to be when the key early decisions are made about funding federal efforts to strengthen family farming and family farm agriculture," he said.

**CAPITOL OFFICE**
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**COMMITTEES**
Appropriations (Agriculture, Rural Development & Related Agencies; Defense; Energy & Water Development; Interior; Treasury & General Government - ranking member); Commerce, Science & Transportation (Aviation; Communications; Manufacturing & Competitiveness - ranking member; Science, Technology & Space; Surface Transportation & Merchant Marine); Energy & Natural Resources (Energy Research, Development, Production & Regulation; Water & Power - ranking member); Indian Affairs

**HOMETOWN**
Bismarck

**BORN**
May 14, 1942, Regent, N.D.

**RELIGION**
Lutheran

**FAMILY**
Wife, Kimberly Olson; three children

**EDUCATION**
U. of North Dakota, B.S. 1965; U. of Denver, M.B.A. 1966

**CAREER**
Public official

**POLITICAL HIGHLIGHTS**
N.D. tax commissioner, 1969-80; Democratic nominee for U.S. House, 1974; U.S. House, 1981-93

**ELECTION RESULTS**

**1998 GENERAL**

| | | |
|---|---|---|
| Byron L. Dorgan (D) | 134,747 | 63.2% |
| Donna Nalewaja (R) | 75,013 | 35.2% |
| Harley McClain (REF) | 3,598 | 1.7% |

**1998 PRIMARY**

| | |
|---|---|
| Byron L. Dorgan (D) | unopposed |

**PREVIOUS WINNING PERCENTAGES**
1992 (59%); 1990 House Election (65%); 1988 House Election (71%); 1986 House Election (76%); 1984 House Election (79%); 1982 House Election (72%); 1980 House Election (57%)

In 1998, Dorgan and other Midwestern Democrats hoped to temporarily revive commodity marketing loans, which would boost federal payments to farmers during times of low crop prices. Although Republicans blocked that plan, Dorgan and his allies won a $5.9 billion emergency aid package for farmers and vowed to return to the fray in the 106th.

The 1998 battle had its roots, in many ways, in a 1996 GOP-written bill called "Freedom to Farm." The measure, signed by a reluctant President Clinton, put an end to New Deal-era crop subsidies and replaced them with a seven-year schedule of fixed but declining payments to farmers. Dorgan opposed the bill, contending it would reduce government farm support even if prices dropped. He proposed his own farm bill, which contained smaller payments, but retained subsidies for farmers when crop prices fell. Republicans rejected it.

Breaking ranks with the White House, Dorgan has been among the fiercest Senate opponents of renewing fast-track authority for the president to negotiate trade agreements that Congress cannot amend. Such authority has helped chief executives in the past strike trade deals, but Dorgan believes this has aggravated the trade deficit and weakened the economy. "We have the largest trade deficit in the history of the world right now, and it's getting worse, not better," he said in a 1997 floor speech. "My message to the administration and to Congress is simple. Fix the trade problems you've already created before you run off and negotiate new agreements that make new problems."

Although the North Dakotan says he understands the need for foreign markets for his state's vast production of wheat, he fiercely protects farm interests against international competition. In 1994, he agreed not to block Senate confirmation of several Clinton appointees for trade positions only after the administration made a deal with Canada limiting that country's wheat exports. American wheat farmers had complained that the Canadian government was unfairly subsidizing its wheat shipments to the United States.

In the 103rd, Dorgan took exception to the Clinton administration's free-trade initiatives — the North American Free Trade Agreement and a bill to implement the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) — which had strong backing from most corporate interests. Dorgan said implementation of GATT would result in job losses for Americans because it would encourage companies to move overseas for cheap labor. It is not fair, he said, to make American workers "compete against a 12-year-old working 12 hours a day for 12 cents an hour."

Dorgan has been one of the Senate's most outspoken critics of the Federal Reserve Board, which he believes does not put enough emphasis on achieving economic growth but instead is preoccupied with keeping a lid on inflation. The Fed does that by raising interest rates, a policy that Dorgan says makes credit more expensive for farmers, other businessmen and consumers who borrow money.

In late 1994, Dorgan joined a demonstration protesting an interest rate increase by the Fed. He said that "behind a locked door," the Fed had made a decision whose cost to the public was "20 times the size of tax increases contemplated by Congress" in the past decade.

After Clinton reappointed Alan Greenspan to a third term as Federal Reserve chairman in 1996, Dorgan was one of seven senators to vote against his confirmation. Greenspan and his colleagues on the Federal Reserve Board, said Dorgan, "view themselves as a set of human brake pads whose mission is to slow down the economy."

Dorgan tries to be a scourge of big corporations and a defender of the disenfranchised. When the Senate considered legislation to overhaul product liability law in the 104th, Dorgan offered an amendment to remove a cap on

## KEY VOTES

**1999**

N Remove President Clinton for grand jury perjury

N Remove President Clinton for obstruction of justice

**1998**

Y Pass omnibus spending bill

Y Override veto of bill to ban "partial birth" abortions

Y Allow vote on bill to increase restrictions on tobacco industry and raise tobacco taxes

Y Restrict future NATO expansion

Y Allow vote on campaign finance overhaul

**1997**

N Allow vote on bill to give president fast-track trade negotiating authority

N Allow vote on bill to let companies offer comp time instead of overtime pay

## INTEREST GROUPS

| | AFL-CIO | ADA | CCUS | ACU |
|---|---|---|---|---|
| 1998 | n/a | 90% | 61% | 12% |
| 1997 | 86% | 80% | 50% | 16% |
| 1996 | 71% | 85% | 38% | 20% |
| 1995 | 100% | 90% | 47% | 13% |
| 1994 | 75% | 85% | 20% | 8% |
| 1993 | 78% | 65% | 10% | 23% |

## CQ VOTE STUDIES

| | PARTY UNITY | | PRESIDENTIAL SUPPORT | |
|---|---|---|---|---|
| | Support | Oppose | Support | Oppose |
| 1998 | 87% | 13% | 75% | 24% |
| 1997 | 84% | 13% | 81% | 19% |
| 1996 | 84% | 16% | 80% | 20% |
| 1995 | 87% | 11% | 85% | 14% |
| 1994 | 86% | 14% | 81% | 19% |
| 1993 | 76% | 16% | 72% | 17% |

## VOTING PARTICIPATION

| | |
|---|---|
| 1998 | 99% |
| 1997 | 98% |
| 1996 | 100% |
| 1995 | 98% |
| 1994 | 99% |
| 1993 | 92% |

punitive damage awards in lawsuits; he said the cap protected manufacturers at the expense of consumers harmed by defective products.

Dorgan also is no fan of most Republican tax and budget proposals, including a balanced-budget amendment to the Constitution, which he has opposed since the GOP took control of Congress. In March 1995, Dorgan and his North Dakota colleague, Kent Conrad, were prominently in the news as the Senate debated the proposed amendment. Dorgan had voted for the amendment in 1994, but in 1995, he and Conrad said they would support it only if it included language to protect Social Security. Republicans would not agree to that, and both North Dakotans voted "no" as the amendment fell barely short of the two-thirds majority required for passage. Both also opposed the amendment in 1996 and 1997.

**At Home:** Dorgan's political beliefs are rooted partly in the populism of the state's old Non-Partisan League and partly in the small-town values of his upbringing. His father was active in the Democratic-leaning Farmers' Union in Regent, N.D., where Dorgan grew up and where, he likes to say, he graduated in the top five in his high school class — of nine.

Dorgan was working in the state tax department in 1969 when he caught the eye of Democratic Gov. William Guy; when the incumbent tax commissioner died in 1969, Dorgan, then 26, got the post. As tax commissioner, Dorgan spoke out on local issues such as property tax revision and on global ones such as military spending. He sued out-of-state corporations to force them to pay taxes. The voters loved it.

Dorgan made it clear he had higher political ambitions by taking on GOP Rep. Mark Andrews in 1974. Dorgan held Andrews to 56 percent.

In 1980, GOP Sen. Milton R. Young retired, and when Andrews ran to succeed him, Dorgan tried again for the House seat. Although favored from the start, Dorgan sought to temper his liberal reputation by supporting an anti-abortion constitutional amendment and decrying government waste. The state went easily for Ronald Reagan, but Dorgan took 57 percent and went on to a string of easy House re-elections.

For most of the 1980s, Dorgan was regarded as a senator-in-waiting — waiting for the retirement of North Dakota's elderly Democratic Sen. Quentin N. Burdick. Dorgan was pushed to run for the Senate in 1986 but declined. Some polls suggested he could defeat GOP Sen. Mark Andrews. When Dorgan demurred, Democrat Kent Conrad, his one time protégé and successor as state tax commissioner, ran and won. Heading into 1988, Dorgan backers hoped to pressure Burdick into retiring, but he wouldn't budge.

Then, in April 1992, Conrad announced that he was retiring to fulfill an earlier pledge that he would not seek re-election unless the federal deficit was reduced. Upon Conrad's unexpected spring 1992 declaration, Dorgan jumped into the race and went on to win with ease over the Republican, Fargo City Commissioner Steve Sydness. Sydness tried to make an issue of Dorgan's 98 overdrafts at the House bank, but that did not seriously hurt Dorgan.

(Interestingly, as Dorgan was replacing Conrad, Conrad was replacing Burdick, who died in September 1992. After Burdick's death, Conrad reversed his earlier decision to retire and won a special election to fill the remaining two years of Burdick's term.)

Dorgan cruised to re-election in 1998, crushing his underfunded GOP foe Donna Nalewaja, a state senator. The challenger called Dorgan a "mediocre" senator who consistently failed to get his proposals enacted into law. But Dorgan said her accusations were "way off base" and pointed to funding he had won for farm assistance and other programs important to the state.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.
March 13, 2001

ASSISTANT SECRETARY

**MEMORANDUM FOR SECRETARY O'NEILL**

**FROM:** Mark Sobel
Acting Assistant Secretary, International Affairs

**SUBJECT:** Luncheon with Secretary Powell, Dr. Rice, Secretary Rumsfield, and Dr. Lindsey

**DATE & TIME:** Wednesday, March 14, 2001, 11:45 am – 1:00 pm

**LOCATION:** Dr. Condeleezza Rice's office, White House

**PARTICIPANTS:**

Treasury: Secretary O'Neill

Others: Secretary Colin Powell, Department of State
Dr. Condeleezza Rice, National Security Council
Secretary Donald Rumsfield, Department of Defense
Larry Lindsey, National Economic Council

**BRIEFING:** Indonesia, Turkey, Argentina and Japan will be discussed at the lunch. Key points and background for each of the four countries are at Tabs A-D.

**ATTACHMENTS**

Tab A: Indonesia
Tab B: Turkey
Tab C: Argentina
Tab D: Japan

DIANNE FEINSTEIN
CALIFORNIA

879-0

01-se-002588

COMMITTEES ON APPROPRIATIONS
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION

# United States Senate

WASHINGTON, DC 20510-0504

EXECUTIVE SECRETARIAT

2001 MAR 13 A 11:40

DEPARTMENT OF
THE TREASURY

March 8, 2001

The Honorable Paul H. O'Neill
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue Northwest
Washington, D.C. 20220-0001

Dear Mr. Secretary:

I am writing to request your assistance regarding the operation of the U.S. Customs license plate reading system in operation at the San Ysidro, Otay Mesa, and Calexico, CA ports of entry which is not being fully utilized to intercept stolen vehicles or drivers who are wanted by law enforcement agencies in connection with other crimes.

Also of great concern is the lack of personnel and other resources needed by Customs to efficiently operate the ports of entry and carry out their enforcement responsibilities.

With respect to the automated license plate reader machines, (LPRs), I was informed that they have been installed at both the northbound and southbound lanes of the ports of entry, primarily to provide information regarding possible criminal investigations when the vehicles return to the United States, and to provide enhanced safety for inspection personnel by allowing them to focus on the vehicle as it enters the northbound inspection lanes.

At issue, however, is the need to utilize the system to intercept southbound vehicles which have been reported stolen or linked to other crimes by various state, federal and local law enforcement agencies. The LPRs scan cars heading south and input the license numbers into a national criminal data base and the Treasury Enforcement Communications System. The LPRs activate an alarm alerting inspectors and Customs supervisors at the ports whenever the system registers a vehicle that has been reported stolen or linked to a variety of other crimes, including felonies.

According to Customs officials, an average of six hits daily are registered at the three ports of entry on vehicles traveling south to Mexico. However, I am informed that because of a lack of resources and infrastructure problems at the ports, the alarms are routinely ignored and the vehicles in question are permitted to leave the country unimpeded and cross into Mexico.

The fact that Customs has the ability to identify vehicles wanted by law enforcement agencies as they are traveling on U.S. highways and does nothing to stop them is deplorable and unacceptable. It is also a source of concern and considerable frustration by law enforcement authorities because criminals and stolen vehicles are being allowed free passage out of the country. I am aware that Customs has implemented periodic enforcement actions with state and local police agencies in which officers are deployed in the southbound lanes to check vehicles for undeclared currency, arms and ammunition, and other goods, and that significant seizures have been made, including stolen vehicles. However, those operations have been sharply curtailed because of insufficient funding and personnel.

According to law enforcement authorities, the traffic backups which occur during such operations have alerted criminals to avoid these routes at those times. Another limitation stems from the location of the license plate reader machines which are so close to the border that it is virtually impossible if a hit is registered on a stolen vehicle to then intercept it before it crosses into Mexico.

Mr. Secretary, because of the seriousness of these matters, I believe there is need for immediate action. I, therefore, respectfully request your assistance in reviewing the issues which I have cited to determine how the license plate reader system now in place can be fully utilized to intercept stolen vehicles and criminals heading into Mexico. I believe it is essential that the Mexican government be consulted and its views solicited. Specifically, I would appreciate your exploring the feasibility of implementing a procedure in which Customs allocates sufficient resources to monitor the license plate readers around the clock, and when hits are registered on vehicles wanted by the law enforcement, that the Mexican authorities are then requested to intercept the cars. Such a system, I hope, would provide for reciprocal cooperation by U.S. authorities to intercept and return Mexican licensed vehicles which have been stolen in that country, or linked to other crimes.

Baja California authorities have estimated that between 5,000 and 10,000 stolen cars from Mexico wound up in the United States last year, and I believe it is important that our governments take whatever steps are necessary to ensure that car thieves and other criminals do not find safe havens by crossing our international border. I am informed that there is a bilateral convention between the US and Mexico which sets forth procedures for the return of vehicles and aircraft which have been stolen from either country. This agreement could serve as a foundation for additional binational efforts which can be undertaken to stop stolen vehicles and apprehend criminals before they manage to clear the U.S.-Mexican border.

Mr. Secretary, I fully realize that implementing steps to resolve these matters will require additional personnel and equipment, which I am willing to support. The lack of adequate resources at the California-Mexico ports of entry by both U.S. Customs and the Immigration and Naturalization Service has been a chronic problem.

It also negatively impacts their enforcement operations, cross-border trade, and efficient operation of the ports of entry, according to Customs sources and others who are familiar with the operation of the ports. In that regard, I call your attention to the following:

- The smuggling of marijuana in trucks, as measured by amounts seized at the Otay Mesa and Tecate commercial cargo inspection facilities increased by 155 percent in FY 2000, from 14,376 kilos seized in FY 1999 to 36,640 kilos confiscated in FY 2000. The number of marijuana seizures also increased from 32 to 59 during the same period.

- Although there are three truck x-ray machines at the Otay Mesa cargo facility, the lack of sufficient personnel has restricted operation to no more than one machine at any time, according to an official with the National Treasury Employees Union.

- The lack of sufficient Customs and INS personnel prevents staffing of all the vehicle inspection lanes at San Ysidro and Otay Mesa during peak periods which results in increased wait times for motorists and congestion at the ports of entry, in addition to jeopardizing the safety of inspection personnel and the public.

Mr. Secretary, I appreciate your personal attention to the aforementioned issues regarding the license plate reader system and Customs' overall resource needs on the Southwest Border. I look forward to your response. I firmly believe it is the responsibility of the federal government to provide our enforcement agencies the tools they need to carry out their missions, and I pledge my support to do what is necessary to ensure that such assistance is provided.

If you need additional information please contact me or have your staff contact David Hantman or Michael Schiffer, of my Washington staff, at 202-224-6443.

With warmest personal regards.

Sincerely yours,

Dianne Feinstein

cc: The Honorable Ambassador Juan Jose Bremer Martino
Embassy of Mexico

DIANNE FEINSTEIN
CALIFORNIA

COMMITTEE ON APPROPRIATIONS
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION

United States Senate
WASHINGTON, DC 20510-0504

March 8, 2001

The Honorable Juan Jose Bremer Martino
Ambassador
Embassy of Mexico
1911 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-3403

Dear Mr. Ambassador:

I am writing first of all, to convey my sincere congratulations on your appointment as Ambassador to the United States, and to wish you all the best in representing your country's interests.

Mexico is fortunate to have someone of your outstanding caliber in this most important post, and I know you will serve your country with distinction. The United States and Mexico have a long history of binational cooperation in many areas, and I firmly believe, after meeting recently with President Vicente Fox in Davos, Switzerland, during the World Economic Forum, that we will continue such cooperation.

In that regard, I would like to call your attention to an issue which I believe has the potential to benefit both of our countries with respect to the interdiction of criminals and stolen vehicles at the California-Mexico ports of entry. The matter involves license plate reading machines (LPRs) which the U.S. Customs has installed at the northbound and southbound approaches to the San Ysidro, Otay Mesa and Calexico ports of entry. The machines were originally installed only to provide information for possible criminal investigations and to enhance officer safety when vehicles enter the United States from Mexico. At the southbound lanes, the machines scan cars heading out of the U.S. and inputs the data into several criminal information data bases, including the National Crime Information System, administered by the Department of Justice. If the machines register the license plate number of a vehicle that has been reported stolen, or one that is linked to other crimes, an alarm is triggered alerting Customs inspectors and supervisors, that the vehicle is heading towards the border. An average total of five to six such hits are registered per day at the three ports of entry.

Unfortunately, because of a lack of resources, and infrastructure limitations, the alarms have gone unheeded by Customs, and the vehicles in question have been permitted to cross the border unimpeded into Mexico. At the San Ysidro port of entry, the installation of the LPRs so close to the border, makes it virtually impossible to intercept a vehicle before it leaves the U.S.

Mr. Ambassador, I am greatly concerned by this situation, as are U.S. law enforcement officials. Moreover, I am committed to doing everything I can to address the problem and to help achieve a positive resolution that is beneficial to the United States and Mexico. It is important that a binational effort be launched to address this problem because of the thousands of vehicles which are also stolen in Mexico and then end up in the United States.

On that point, I have requested Secretary of the Treasury, Paul. H. O'Neill, to look into these matters, and I have emphasized the importance of our two nations working together to address these issues. I strongly believe that it is in the best interest of the United States and Mexico to make every effort to intercept stolen vehicles and criminals who cross our international border in violation of the laws of both our nations.

Therefore, I respectfully request your assistance in reviewing these issues and providing your views on whether Mexico would be receptive to working with U.S. Customs on a procedure in which Mexican authorities would intercept stolen vehicles when notified that they are approaching the Mexican vehicle inspection lanes. It is my hope that reciprocal procedures would be implemented so that U.S. authorities would similarly apprehend stolen vehicles and criminals who seek to enter the United States from Mexico. I am aware that a bilateral convention signed by the United States and Mexico on January 10, 1981 reaffirmed the desire of our nations to continue to assist each other in recovering and returning vehicles and aircraft which have been stolen in each other's country. I believe this agreement represents a good foundation on which additional binational cooperation can be undertaken to prevent stolen vehicles from entering our respective nations.

The prosecution or extradition of criminal suspects who are apprehended would of course have to be addressed within the legal framework of our respective nations and in accordance with existing binational agreements.

Mr. Ambassador, thank you for your cooperation in this matter. I look forward to your response, and remain ready to cooperate in every way possible. If you need additional information, please do not hesitate to contact me or have your staff contact David Hantman or Michael Schiffer of my Washington staff, at 202-224-3841.

With warmest personal regards.

Sincerely yours,

Dianne Feinstein
United States Senator

cc: The Honorable Paul H. O'Neill,
Secretary of the Treasury

## EXECUTIVE SECRETARIAT CORRESPONDENCE COVER SHEET

**Tuesday, March 13, 2001**

## ACTION REQUIRED

PROFILE #: 2001-SE-002588

DATE CREATED: 03/13/2001

ADDRESSEE: Paul H. O'Neill
Secretary

AUTHOR: Feinstein, Dianne
Senate

SUBJECT: Customs Operations At The San Ysidro, Otay Mesa And Calexico, CA, Ports Of Entry

ABSTRACT: Expresses concern that the Customs operations at the San Ysidro, Otay Mesa and Calexico, CA, ports of entry are not fully utilizing the automated license plate reader machines (LPRs). Suggests that Customs allocate sufficient resources to monitor the LPRs around the clock, and when hits are registered on vehicles wanted by the law enforcement, the Mexican authorities be requested to intercept the cars. Also expresses concern about the inadequate funding for Customs to efficiently operate the ports of entry and carry out their enforcement responsibilities.

## TASK ASSIGNMENT MEMORANDUM

ASSIGNED TO: James F. Sloan
Acting US, Enforcement

DATE DUE: 03/20/2001

REQUIRED ACTION: Secretary Signature

TASK: Please prepare a response for the signature of the Secretary and clear with General Counsel. Please have Legislative Affairs prepare an interim response if you are unable to respond by the due date.

DISTRIBUTION: EXECUTIVE SECRETARIAT
AS, LEGISLATIVE AFFAIRS
GENERAL COUNSEL

March 13, 2001

**MEMORANDUM FOR SECRETARY O'NEILL**

**THROUGH:** John Duncan
Assistant Secretary
(Legislative Affairs and Public Liaison)

**FROM:** Bill Fant
Acting Deputy Assistant Secretary (Tax & Budget)

**SUBJECT:** Meeting with Centrists

**DATE:** Wednesday, March 14, 2001

**TIME:** 4:00 – 5:00 PM

**LOCATION:** Treasury

**PARTICIPANTS:** Secretary O'Neill
John Duncan

**SUMMARY:**

As you know, Congressional Centrists account for the critical swing vote in consideration of the President's budget and tax plan. Rather than reiterate the Administration position on the tax plan and fiscal policy, you should demonstrate to them that the lines of communication are open between Capital Hill and the Treasury, and listen to their ideas. However, it is not time to negotiate.

The Centrists probably will be particularly focused in three areas:

- Triggers and alternatives. A press release describing a resolution introduced by Senators Bayh and Snowe is attached.
- Irreducible debt
- Effect of the President's Budget on the Medicare Surplus

Release Date: MARCH 07, 2001

NEWS FROM
UNITED STATES SENATE

March 7, 2001

[1] Washington, D.C. -- U.S. Senators Olympia Snowe and Evan Bayh today introduced a bipartisan, bicameral resolution in support of a "trigger" mechanism that will enable Congress to provide broad- based tax relief that is fiscally responsible and avoids a return to annual deficits. With a trigger mechanism in place, the first phase of a tax cut would be implemented immediately and be irrevocable. In future years, certain elements of phased-in tax relief would be implemented as long as specified debt-reduction targets are met.

[2] Snowe and Bayh have been leading the Senate efforts to advance the trigger approach, as others -- including Federal Reserve Chairman Alan Greenspan -- have endorsed the idea in recent months as a way to ensure that fiscal responsibility and debt reduction remain national priorities. Eleven Senators of both parties (six Democrats and five Republicans) joined Snowe and Bayh this morning in support of the resolution. In addition, Representative Ellen Tauscher (D-CA) and Representative Amo Houghton (R-NY), leaders of the House Centrist Coalition, announced the group's support of the trigger resolution,

[3] "A trigger will provide a strong incentive for Congress to act responsibly in the future allocation of the surplus, while also serving as a 'backstop' should estimates prove too optimistic," said Snowe, a member of both the Senate Budget Committee and the Senate Finance Committee. "The principles in our resolution provide firm footing on which to develop a trigger mechanism as tax and spending policies are implemented."

[4] "Our approach combines two important principals of fiscal conservatism, "Bayh said. "First,we believe in broad-based tax relief for all Americans. Second, we are committed to balancing the budget and avoiding public debt and deficits."

[5] "By incorporating these principles in the upcoming Fiscal Year 2002 budget resolution, I hope we can help bridge the partisan divide and bring about a bipartisan agreement on tax and spending policies in the budget," Snowe added. "We are here because we want to make tax relief WORK -- not only for. American families, but for the future economic health and well-being of the nation."

[6] "Congress should approach the federal budget the same way most American families handle their own finances," Bayh said. "Invest in priorities, save as much as possible for the future, and stay out of debt. The trigger turns a common sense principle into law -- 'don't spend it if you don't have it.'"

[7] "With a $ 5.6 trillion surplus projected by the Congressional Budget Office for the next ten years, we have an obligation to be responsible stewards of that surplus, so we can seize the opportunity to address pressing national needs like buying down the debt, investing in education and health care, and passing meaningful tax relief," said Snowe. "As the budget lays down a ten- year blueprint for spending and taxes, we believe the time is now to incorporate a set of principles in the budget that can serve as a foundation for specific legislative mechanisms in the tax bill."

[8] Joining Snowe and Bayh as cosponsors of the resolution are Senators Tom Carper (D-DE), Lincoln Chafee (R-RI), Susan Collins (R-ME), Dianne Feinstein (D-CA), Jim Jeffords (R-VT), Mary Landrieu (D-LA), Arlen Specter (R-PA), Debbie Stabenow (R-MI), and Robert Torricelli (D-NJ).

SUMMARY: SNOWE-BAYH TAX CUT "TRIGGER" RESOLUTION

- o The Snowe-Bayh "trigger" resolution is a bipartisan, bicameral expression of support for a safety mechanism that would address the uncertainty inherent in long-term budget projections.

- o The trigger would link long-term tax cuts and future spending to debt reduction targets in order to ensure that the publicly-held debt is paid down and on-budget deficits are prevented.

- o Under the trigger mechanism, the phase-in of long-term tax and spending proposals would be linked to actual budgetary

outcomes. For instance, a trigger would outline specific legislative or automatic action to be taken if specified levels of public debt reduction are not realized during the coming 10 years.

o Enactment of a trigger will not prevent Congress from passing other legislation affecting the level of federal revenues or spending should future economic performance dictate such action, and it will not repeal any tax cuts or spending programs that have already been implemented.

o The trigger reduces the uncertainty of an irrevocable decision over an extended period of time and forces the federal government to practice fiscal responsibility. The trigger is one way to ensure that the budget will remain balanced, and that a premium is placed upon paying down the debt.

o The general mechanics of the trigger are as follows:

o As long as specified debt reduction targets are met, the phase in of tax cuts continue as scheduled.

o If debt reduction targets are not met (due to inaccurate projections, for example) the trigger would delay the implementation of tax and spending proposals until debt-reduction efforts are back on schedule.

o The trigger would NOT repeal or cancel any previously implemented portion of a tax cut or spending program -- it would only apply prospectively.

o The trigger does NOT prevent Congress from cutting taxes or increasing spending in order to address future economic circumstances.

********** End of Document **********

July 10, 2001

FBI “Phoenix” Memorandum

Subject: Osama bin Laden Supporters Attending Civil Aviation Universities/College in state of Arizona

(Rev 08-28-2000)

SECRET

# FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE Date: 07/10/2001

To: Counterterrorism Attn: RFU
SSA [redacted]
IRS [redacted]

New York

From: Phoenix
[redacted]
Contact: SA [redacted]

Approved By: [redacted]

Drafted By: [redacted]

Case ID #: (S) [redacted] (Pending)

Title: (S) [ZAKARIA MUSTAPHA SOUBRA;
IT-OTHER [redacted]]

Synopsis: (S) UBL [redacted] supporters attending civil aviation universities/colleges in the State of Arizona.

(S) Derived From : G-3
Declassify On: X1

(U) (S) Full Field Investigation Instituted: 04/17/2000 (NONUSPER)

Details: (S) [The purpose of this communication is to advise the Bureau and New York of the possibility of a coordinated effort by USAMA BIN LADEN (UBL) to send students to the United States to attend civil aviation universities and colleges. Phoenix has observed an inordinate number of individuals of investigative interest who are attending or who have attended civil aviation universities and colleges in the State of Arizona. The inordinate number of these individuals attending these type of schools and fatwas [redacted]

SECRET

[redacted] 60267 1 of 4
c/d
[redacted] 1,6

To: Counterterrorism From: Phoenix
Re: [redacted] 07/10/2001

(S) [redacted] gives reason to believe that a coordinated effort is underway to establish a cadre of individuals who will one day be working in the civil aviation community around the world. These individuals will be in a position in the future to conduct terror activity against civil aviation targets.

(S) Phoenix believes that the FBI should accumulate a listing of civil aviation universities/colleges around the country. FBI field offices with these types of schools in their area should establish appropriate liaison: FBIHQ should discuss this matter with other elements of the U.S. intelligence community and task the community for any information that supports Phoenix's suspicions. FBIHQ should consider seeking the necessary authority to obtain visa information from the USDOS on individuals obtaining visas to attend these types of schools and notify the appropriate FBI field office when these individuals are scheduled to arrive in their area of responsibility.

(S) Phoenix has drawn the above conclusion from several Phoenix investigations to include captioned investigation and the following investigations: [redacted], a Saudi Arabian national and two Algerian Islamic extremists [redacted]

(S) Investigation of ZAKARIA MUSTAPHA SOUBRA was initiated as the result of information provided by [redacted] a source who has provided reliable information in the past. The source reported during April 2000 that SOUBRA was a supporter of UBL and [redacted]. SOUBRA arrived in Arizona from London, England on 08/27/1999 on an F-1 student visa to attend EMBRY RIDDLE UNIVERSITY (ERU), Prescott, Arizona. ERU only teaches courses related to the field of aviation. SOUBRA is an Aeronautical Engineering student at ERU and has been taking courses in "international security" relating to aviation. SOUBRA, within weeks of his arrival at Prescott, Arizona, [redacted] supporting UBL, at Mosques located throughout Arizona. SOUBRA has also organized anti United States and Israeli demonstrations in the area of ARIZONA STATE UNIVERSITY (ASU), Tempe, Arizona. He has also established and organized an Islamic student association on the ERU campus organizing the Muslim student population on the ERU campus.

(S) Phoenix has identified several associates of SOUBRA at ERU who arrived at the university around the same time that he

To: Counterterrorism From: Phoenix
Re: (S) [redacted] 07/10/2001

did. These individuals are Sunni Muslims who have the same radical fundamentalists views as SOUBRA. They come from Kenya, Pakistan, United Arab Emirates, India, Saudi Arabia and Jordan. SOUBRA's associates are (S)

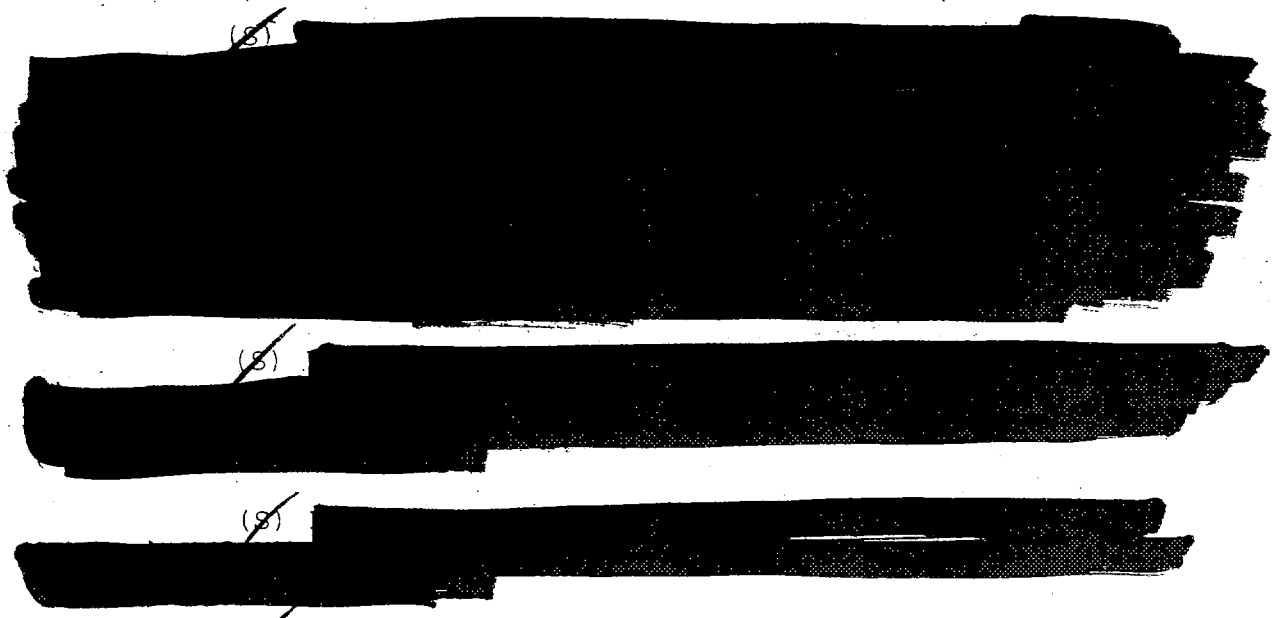
(S) [redacted]

(S) The above individuals are involved with SOUBRA and regularly participate in meetings with him in Prescott, Arizona.

(S) FBIHQ, IRS [redacted] RFU, wrote an analytical paper on the [redacted] dated 11/09/1999, in support of FBINY investigation captioned: [redacted]

[redacted] research paper can be found in [redacted] The following information was gleaned from IRS research paper.

To: Counterterrorism From: Phoenix
Re: (S) [redacted] 07/10/2001



(S) " The Fatwa is jihad against the U.S. and British government, armies, interests, **airports** (emphasis added by FBI Phoenix), and instructions and it has been given because of the U.S. and British aggression against Muslims and the Muslim land of Iraq...we...confirm that the only Islamic Fatwa against this explicit aggression is Jihad. Therefore the message for the British governments or any other government of non-Muslim countries is to stay away from Iraq, Palestine, Pakistan, Arabia, etc...or face full scale war of Jihad which it is the responsibility and the duty of every Muslim around the world to participate in...We...call upon...Muslims around the world including Muslims in the USA and in Britian to confront by all means whether verbally, financially, politically or militarily the U.S. and British aggression and do their Islamic duty in relieving the Iraqi people from the unjust sanctions."

(S) SOUBRA was interviewed by FBI Phoenix on 04/07/2000 and 05/11/2000 at his residence. On 04/07/2000, interviewing Agents observed photocopied photographs of UBL, IBN KHATTAB and wounded Chechnyan Mujahadin tacked to his livingroom wall. SOUBRA admitted to [redacted] in the State of Arizona. SOUBRA stated that he considers the United States Government and U.S. Military forces in the Gulf as "legitimate military targets of Islam." He also stated that the targeting of the U.S. Embassies in Africa was "legitimate." SOUBRA denied having received any military training. However; Phoenix believes that SOUBRA was being less than truthful in this

regard. SOUBRA was defiant towards interviewing Agents and it was clear that he was not intimidated by the FBI presence. It is obvious that he is a hardcore Islamic extremist who views the U.S. as an enemy of Islam. Investigation of SOUBRA is continuing.

(S)

[redacted]

(S)

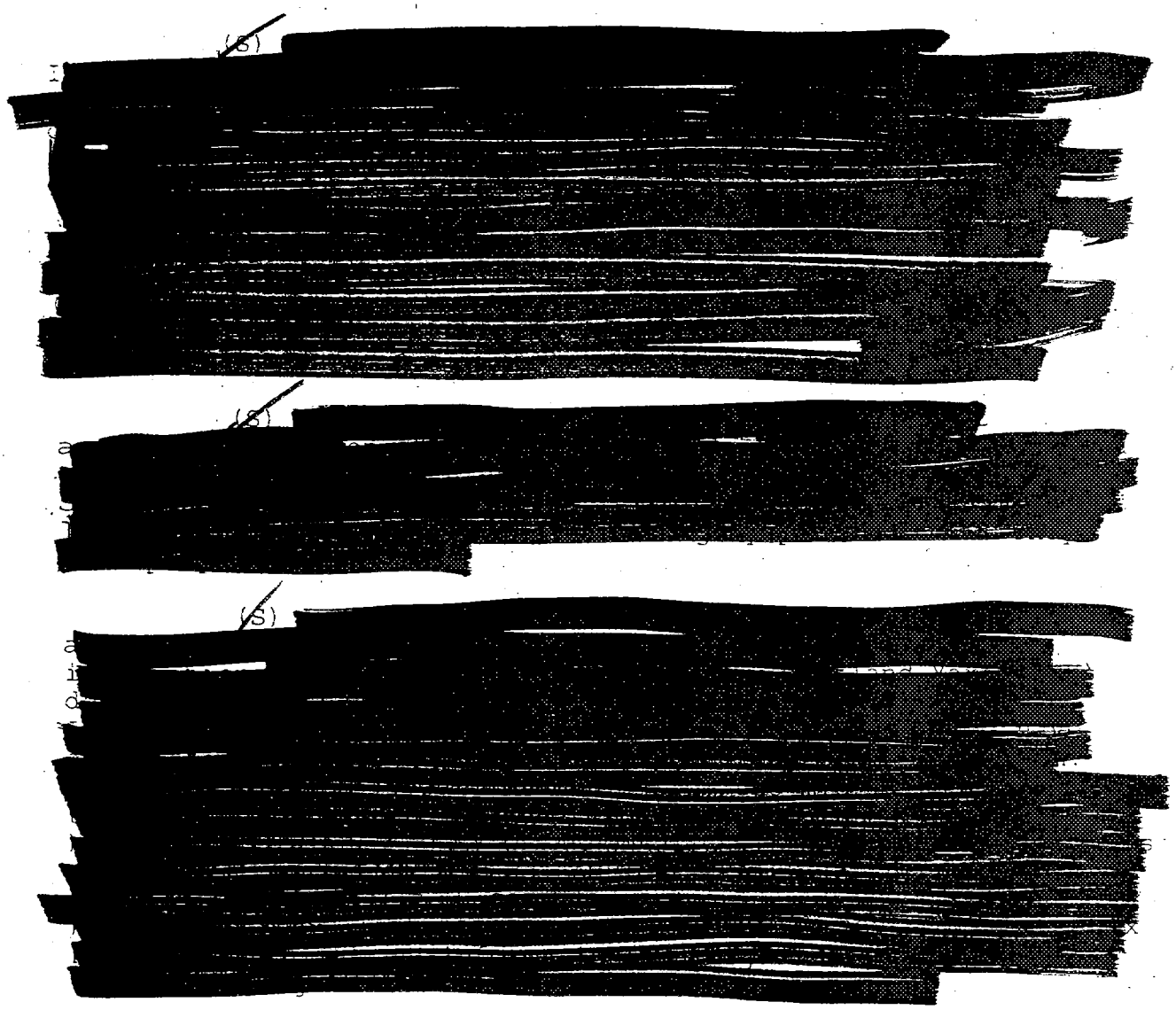
[redacted]

(S)

[redacted]

(S)

[redacted]



(S) Phoenix believes that it is more than a coincidence that subjects who are supporters of UBL are attending civil aviation universities/colleges in the State of Arizona. As receiving offices are aware, Phoenix has had significant UBL associates/operatives living in the State of Arizona and conducting activity in support of UBL. [WADIH EL-HAGE, a UBL lieutenant recently convicted for his role in the 1998 bombings of U.S. Embassies in Africa, lived in Tucson, Arizona for several years during the 1980s. [redacted]

To: Counterterrorism From: Phoenix
Re: [redacted] 07/10/2001

[redacted]

(S) This information is being provided to receiving offices for information , analysis and comments.

To: Counterterrorism From: Phoenix
Re: (S) [redacted] 07/10/2001

LEAD(s):

Set Lead 1:

COUNTERTERRORISM

AT WASHINGTON, DC

(S) The RFU/UBLU is requested to consider implementing the suggested actions put forth by Phoenix at the beginning of this communication.

Set Lead 2:

NEW YORK

AT NEW YORK, NEW YORK

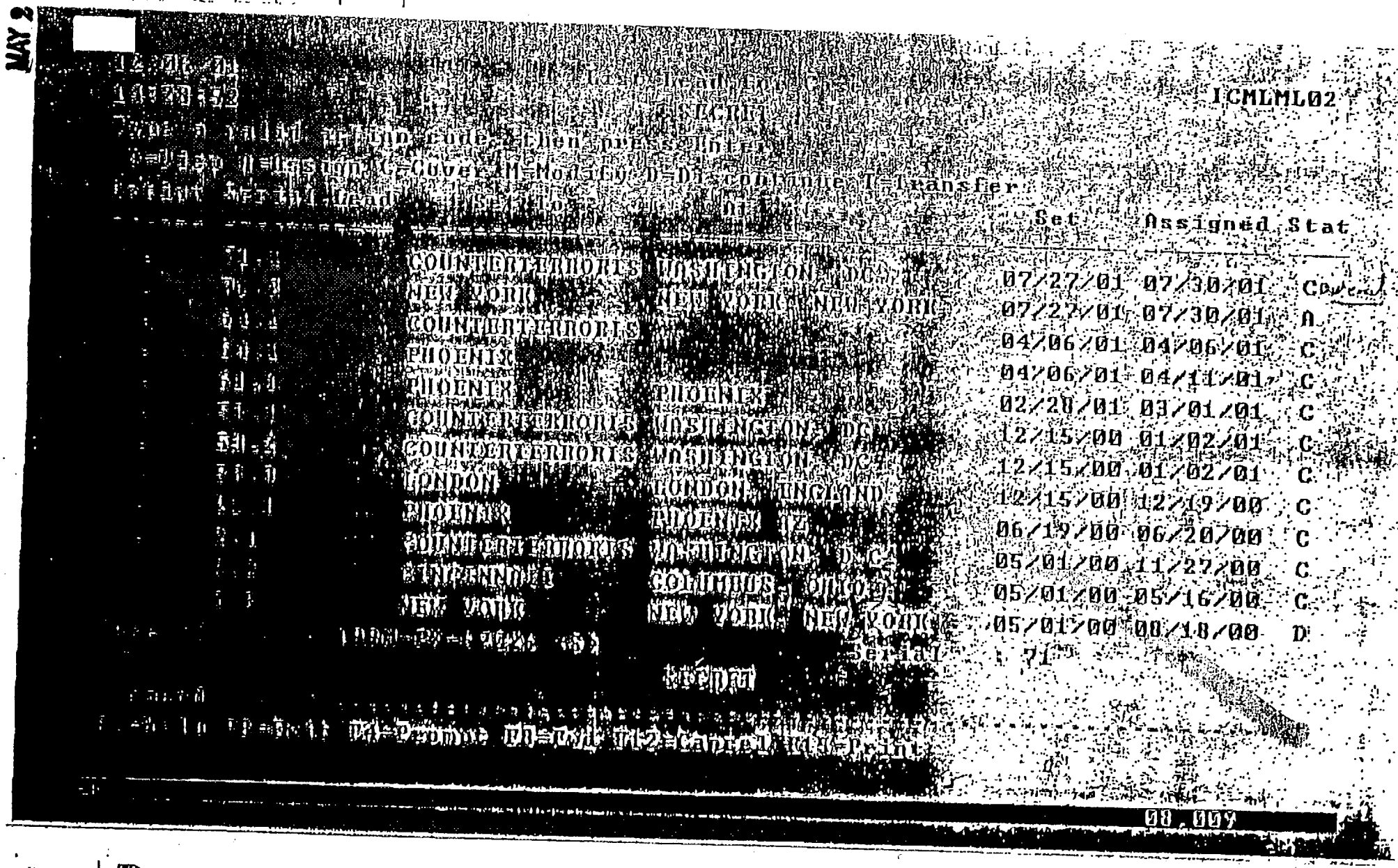
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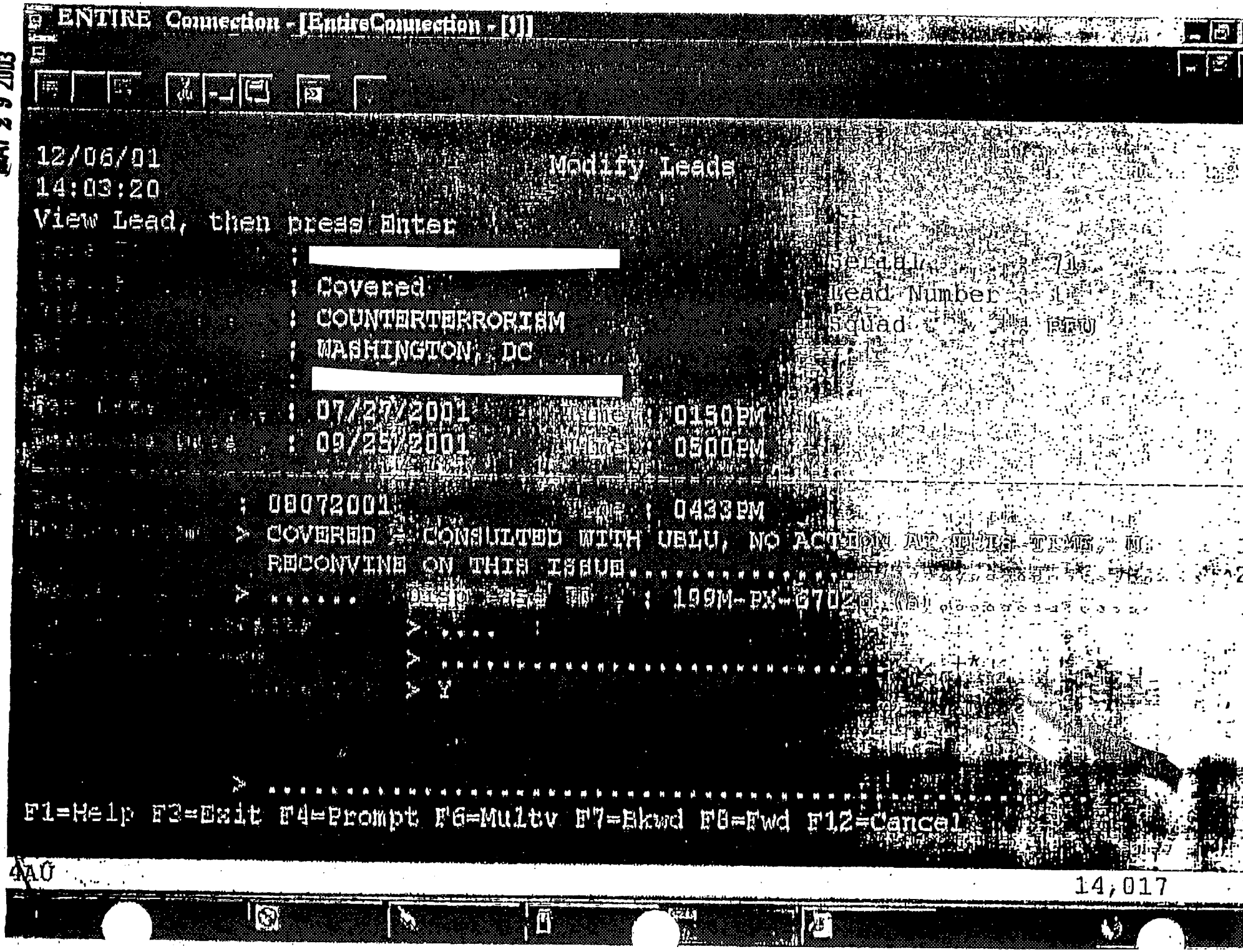
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| NEW YORK NEW YORK NEW YORK | 05/01/00 | 08/18/00 | D |

Serial : 71

08 009

MAY 29 2003 NO.070 P.10




MAY. 3.2002 1:23PM

July 16, 2001.

Department of Defense Report

Re: United States engagement with the Taliban on Osama bin Laden.

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SECRET NODIS
DECL: 7/16/11

S1

RELEASED IN FULL

**U.S. Engagement with the Taliban on Usama Bin Laden**

DECAPTIONED

Since the Taliban captured Kabul in 1996, the United States has consistently discussed with them peace, humanitarian assistance, drugs and human rights. However, we have made clear that Usama bin Laden (UBL) and terrorism is the preeminent issue between the U.S. and the Taliban.

- These concerns over bin Ladin preceded the 1998 bombings.
- For instance, Secretary Christopher wrote to the Taliban Foreign Minister in 1996 that "we wish to work with you to expel all terrorists and those who support terrorism..."

In our talks we have stressed that UBL has murdered Americans and continues to plan attacks against Americans and others and that we cannot ignore this threat.

- Have also emphasized that the international community shares this concern. In 1999 and in 2000, the UN Security Council passed resolutions demanding that UBL be expelled to a country where he can be brought to justice.
- Have told the Taliban that the terrorist problem is not confined to bin Laden and that the Taliban must take steps to shut down all terrorist activities.
- Have told them that the resolution of the bin Laden issue and steps to close the terrorist apparatus would enable us to discuss other issues in an improved atmosphere.
- Conversely, have stressed that if this terrorism issue is not addressed, there can be no improvement in relations.

These talks have been fruitless. The Taliban usually said that they want a solution but cannot comply with UNSCRs. Often the Taliban asked the U.S. to suggest a solution.

- In October 1999, the Taliban suggested several "solutions" including a UBL trial by a panel of Islamic scholars or monitoring of UBL Afghanistan by OIC or UN.
- Taliban consistently maintained that UBL's activities are restricted, despite all evidence to the contrary.



Classified by: Christina B. Rocca, A/S for South Asia
Reasons: E.O. 12958; 1.5 (b) and (d)

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: SHARON E AHMAD
DATE/CASE ID: 08 SEP 2003 200103969

Often our discussions have been followed by Taliban declarations that no evidence exists against UBL and that he will not be expelled as demanded by the UN resolutions. Highlights of our talks with the Taliban follow.

## Pre-Embassy Bombings

**1996**

- On September 18 meeting with Taliban Deputy Foreign Affairs Advisor Jalil, Embassy Islamabad Poloff, drawing on points provided by the Department, urged the Taliban to make UBL unwelcome. Jalil replied that the Taliban do not support terrorism and would not provide refuge to bin Ladin. (96 Islamabad 8055).

- On December 6, Embassy Islamabad DCM Holzman delivered a response on behalf of Secretary of State Christopher to Taliban acting Foreign Minister Ghaus's earlier letter. In this response, the U.S. expresses its wish to work with the Taliban to expel all terrorists from Afghan soil. The Taliban are told that harboring bin Laden and allowing him and his supporters to transit Afghan territory at will and to conduct uncontrolled activities greatly hurt prospects for Afghanistan rejoining the world community. SA A/S Raphel delivered the original letter from which Islamabad response was drawn to Taliban-designated UN representative Hamid Karzai on December 10. (96 State 254588)

**1997**

- In a January 16 meeting with Wakil Ahmed, then Political Adviser to Mullah Omar, Embassy Islamabad DCM Holzman proposed that a U.S. team visit militant training camps in easthern Afghanistan in late January. Ahmed replied that there is no problem with visiting the camps but he would check with Kandahar on the schedule. (97 Islamabad 0481)

- On January 20, Taliban Deputy Foreign Minister Jalil told Embassy Islamabad poloff that the Taliban supported the U.S. on counterterrorism and counternarcotics issues. He suggested that the U.S. postpone its visits to the camps until after Ramadan in mid-February. (97 Islamabad 0481)

- On January 21 SA Assistant Secretary Raphel told Taliban Political Advisor Wakil Ahmed that the Taliban have alienated the U.S. and the international community through their providing sanctuary to the UBL. (97 Islamabad 698)

- In a February 11 telephone call, Taliban Deputy Foreign Minister Jalil told poloff that the U.S. should postpone its proposed visits to the militant camps "a couple of weeks" because of heavy snows in Nangarhar and Khost. (97 Islamabad 1113)

- On March 2 and 3, during a visit to Afghanistan, SA/PAB Deputy Director Camp was told by Taliban inner Shura member Ehsanullah Ehsan that expulsion of bin Laden was not a solution. At these meetings, U.S. officials reminded the Taliban that the U.S. was waiting for a Taliban response on the proposed U.S. visit to militant camps reportedly closed by the Taliban. (97 Islamabad 1750)

- In response to instructions from the Department, Islamabad Embassy DCM Holzman told Taliban Ambassador to Pakistan Mufti Afghani that the Taliban should immediately expel bin Laden from Taliban-controlled territory in light of his recent remarks threatening the U.S. Afghani promised a response from Kandahar. (97 Islamabad 1745)

- On April 1, Taliban Ambassador to Afghanistan Afghani told Islamabad Embassy DCM Holzman that the Taliban had rescinded their offer for the U.S. to visit militant training camps in Eastern Afghanistan. (97 Islamabad 2668)

- On December 8, two visiting Taliban ministers assured SA/PAB Director that UBL was being kept under restriction. (97 State 231842)

1998

- In February 21-25 meetings in Kabul with Taliban deputy Foreign Minister Haqqani, Islamabad Embassy DCM Eastham emphasized that the U.S. wants to see Afghanistan fulfill its international obligations in a number of areas, including counterterrorism. (98 Islamabad 1489)

- In a March 2 meeting with Taliban Ambassador to Pakistan Dilawar, Embassy Islamabad DCM Eastham expressed U.S. concerns over bin Laden's recent calls for attacks against U.S. targets and the reported presence of Egyptian militants in Taliban-controlled territory. (98 Islamabad 1573)

- In a March 3 meeting in New York, Taliban representative Abdul Mujahid told SA/PAB Director Malinowski that UBL was under restriction by the Taliban. (98 State 41115)

- In separate meetings with a U.S. team visiting Kandahar, March 22-24, Kandahar governor Hasan and Taliban deputy Foreign Minister Jalil denied that UBL had recently issued a fatwa against the U.S. and that he is under Taliban control and would not be allowed to engage in anti-U.S. activities. (98 Islamabad 2258)

- In a March 26 meeting with Taliban Deputy Foreign Minister Haqqani, Islamabad Embassy Charge Eastham underscored U.S. concerns about the recent fatwa issued by bin Laden against the U.S. Haqqani denied bin Laden's involvement in the fatwa and assured that UBL was under Taliban restriction. Charge invited the Taliban to send a senior official to meet with U.S. UN Permrep Richardson during his visit to the region. (98 Islamabad 2291)

- On April 17, Ambassador Bill Richardson visited Afghanistan to persuade the warring parties to agree to negotiations. (98 Islamabad 2990)

## Post Embassy Bombings

- On August 22, SA/PAB Director spoke on the telephone with Mullah Omar in which Omar expressed interest in a confidential dialogue with the U.S. through our respective embassies in Islamabad. (98 State 154712)

- On August 23, following the August 22 telephone conversation with Mullah Omar in which Omar indicated a willingness for dialogue, the Department instructed Embassy Islamabad to pass a formal message to the Taliban regarding the August 20 U.S. strikes against Khost, evidence against bin Laden, neutrality in the conflict,

and interest in a dialogue with the Taliban. (98 State 154713)

- On August 23, Embassy Islamabad poloff delivered these points by telephone to Taliban Second Secretary Tayyab Husseini at the Taliban Islamabad Embassy. (98 Islamabad 6359)

- On August 25, Embassy Islamabad delivered State 154713 points in English and Pushtu to Taliban Islamabad embassy Charge Rahman Haqqani. Haqqani promises to send the text to Kandahar. (98 Islamabad 6425)

- On September 2, Taliban Second Secretary Husseini told Embassy Islamabad poloff by telephone that a Taliban response to U.S. dialogue proposals was being delayed by current tensions between Kandahar and Tehran. (98 Islamabad 6573)

- In September 13 discussion with new Taliban "Permrep" Mujahid, Islamabad Embassy DCM Eastham warned that the Taliban will be held directly responsible for any further terrorist acts instigated by bin Laden. (98 Islamabad 6863) Mujahid urged patience.

- On October 3, SA/PAB Director delivered U.S. concern over UBL's presence in Afghanistan to close Mullah Omar aide Wakil Ahmed via telephone. (98 State 183868)

- October 11, 1998 Ambassador Milam met with Wakil Ahmed, close assistant to Mullah Omar. He told the Taliban that the longer they shelter bin Laden, the more they will be associated with his crimes. (98 Islamabad 7665)

- On October 21, U/S Pickering and A/S Inderfurth told Taliban representative Mujahid that the U.S. would hold the Taliban responsible for acts committed by UBL against the U.S. Mujahid said that expelling UBL would violate Taliban rules of hospitality. (98 State 213222)

- At a November 11 meeting with Ambassador Milam, Taliban representative Haqqani said that bin Ladin had to be tried by the Taliban, since Afghanistan had no extradition treaty. (98 Islamadad 8410)

- On November 28, Taliban senior spokesman Wakil Ahmed told U.S. Embassy Islamabad Charge that any attempt to expel bin Laden would result in the downfall of the Taliban. (98 Islamabad 8803)

- On December 14, Taliban Islamabad Embassy Charge told visiting SA Deputy Assistant Secretary Lanpher that UBL is under restriction and accused the U.S. of coercing suspects in the embassy bombings to admit to links to UBL. (98 Islamabad 9128)

- On December 15, the Taliban-controlled Embassy in Islamabad sent a note to the U.S. Embassy in the name of Taliban Charge Haqqani. The letter maintained that UBL was restricted by the Taliban. (98 Islamabad 9134)

- On December 28, SA/PAB Director Malinowski raised in strong terms with Taliban New York representative Mujahid recent public threats against Americans issued by bin Laden. On December 30, Mujahid told Malinowski that the response from Mullah Omar aid Wakil Ahmed was that UBL issued his threats at the press conference due to "pressure from journalists." He added that the Taliban's position that bin Laden was a guest who would not be expelled still held. (98 State 238275)

1999

- Between February 3 and May 29, 1999, SA Assistant Secretary Inderfurth, S/CT coordinator Sheehan, and Ambassador Milam each meet once with Taliban Deputy Foreign Minister Mullah Jalil in Islamabad to urge the Taliban to turn over UBL.

- On July 19 in Tashkent, Assistant Secretary of State for South Asian Affairs Karl Inderfurth told Taliban Information Minister Muttaqi that the U.S. would be forced to take further actions if bin Laden is not brought to justice. Muttaqi showed no willingness to turn over bin Laden. (99 Tashkent 3036)

- On October 25, Assistant Secretary Inderfurth met with Taliban representative Abdul Mujahid to hand over a letter from Undersecretary of State for Political Affairs Thomas Pickering replying to Mullah Omar's recent letter to the President. Inderfurth summarized the points of the letter: The U.S. was not opposed to Islam; bin Laden was in Afghanistan planning attacks on

the U.S. and elsewhere; the UN Security Council had unanimously passed a resolution calling on the Taliban to hand bin Laden over to a country where he could be brought to justice; we were ready to discuss this issue and had in fact raised it over 20 times with Taliban officials. Mujahid made two proposals. The first was that the Taliban would confine UBL in Afghanistan under supervision of the OIC, NAM or the UN. Inderfurth rejected this proposal and noted that it did not meet UNSCR 1267's requirements. The second proposal was for a panel of Islamic scholars to decide UBL's future. One scholar would be from Afghanistan, one from Saudi Arabia, and one from a third country. Inderfurth noted that if this process took place, the U.S. hoped it would lead to extradition. The U.S. would not be bound by the panel's decision, however. The Security Council resolution would continue in place until UBL was brought to justice.

2000

- Assistant Secretary Inderfurth and S/CT Coordinator Sheehan discussed Taliban support for Usama bin Ladin with Taliban Director for Administration Muttaqi at a January 20 meeting in Islamabad. Muttaqi restated previous Taliban positions. (2000 Islamabad 567)

- On May 27, in Islamabad, Undersecretary Pickering gave Taliban Deputy Foreign Minister Jalil a point-by-point outline of the information tying Usama bin Laden to the 1998 embassy bombings (2000 Islamabad 2899). The Taliban subsequently rejected this evidence.

- Undersecretary Pickering told Taliban Deputy Foreign Minister Zahid on September 29 that the solution to the issue of Usama bin Laden is compliance with UNSCR 1267. There was no further response by the Taliban. (2000 State 191767)

- In October, Deputy Assistant Secretary Eastham met with Taliban Deputy Foreign Minister Jalil in Frankfurt, Germany. He reiterated our concerns on terrorism, described new sanctions resolution being moved, and said a positive resolution of the UBL problem would change the situation. No Taliban response.

2001

- On February 8, SA Deputy Secretary Eastham told Taliban representative Mujahid that, as a result of UNSCRs 1267 and 1333, the Taliban must close their office. Mujahid delivered a letter from Taliban Foreign Minister Muttawakil that repeated Taliban assertions that no evidence regarding UBL's terrorist activities has been presented. (State 28054)

- On March 19, Taliban envoy Ramatullah Hashimi told SA/PAB Director that he brought "nothing new" to offer on complying with UNSCRs 1267 and 1333. (State 50411)

- On July 2, Taliban Deputy Foreign Minister Jalil told U.S. Ambassador to Pakistan Milam that UBL has not been convicted and that the Taliban still consider him innocent. (Islamabad 3702)

Draft: James Cole 76708 SAPAB 01 AFGHAN P-
07TALIBANENGAGEMENT
APPROVE:SA:CROCCA
CLEAR:SA:GUSREY
SA/PAB:JLUNSTEAD

August 6, 2001

CIA President's Daily Brief

President's Daily Brief: Bin Ladin Determined To Strike in US

.

Declassified and Approved
for Release, 10 April 2004

## Bin Ladin Determined To Strike in US



*Clandestine, foreign government, and media reports indicate Bin Ladin since 1997 has wanted to conduct terrorist attacks in the US.* Bin Ladin implied in US television interviews in 1997 and 1998 that his followers would follow the example of World Trade Center bomber Ramzi Yousef and "bring the fighting to America."

> After US missile strikes on his base in Afghanistan in 1998, Bin Ladin told followers he wanted to retaliate in Washington, according to a [redacted] service.

> An Egyptian Islamic Jihad (EIJ) operative told an [redacted] service at the same time that Bin Ladin was planning to exploit the operative's access to the US to mount a terrorist strike.

*The millennium plotting in Canada in 1999 may have been part of Bin Ladin's first serious attempt to implement a terrorist strike in the US.* Convicted plotter Ahmed Ressam has told the FBI that he conceived the idea to attack Los Angeles International Airport himself, but that Bin Ladin lieutenant Abu Zubaydah encouraged him and helped facilitate the operation. Ressam also said that in 1998 Abu Zubaydah was planning his own US attack.

> Ressam says Bin Ladin was aware of the Los Angeles operation.

*Although Bin Ladin has not succeeded, his attacks against the US Embassies in Kenya and Tanzania in 1998 demonstrate that he prepares operations years in advance and is not deterred by setbacks.* Bin Ladin associates surveilled our Embassies in Nairobi and Dar es Salaam as early as 1993, and some members of the Nairobi cell planning the bombings were arrested and deported in 1997.

*Al-Qa'ida members—including some who are US citizens—have resided in or traveled to the US for years, and the group apparently maintains a support structure that could aid attacks.* Two al-Qa'ida members found guilty in the conspiracy to bomb our Embassies in East Africa were US citizens, and a senior EIJ member lived in California in the mid-1990s.

> A clandestine source said in 1998 that a Bin Ladin cell in New York was recruiting Muslim-American youth for attacks.

*We have not been able to corroborate some of the more sensational threat reporting, such as that from a [redacted] service in 1998 saying that Bin Ladin wanted to hijack a US aircraft to gain the release of "Blind Shaykh" 'Umar 'Abd al-Rahman and other US-held extremists.*

*continued*



Declassified and Approved
for Release, 10 April 2004

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for Release, 10 April 2004

— Nevertheless, FBI information since that time indicates patterns of suspicious activity in this country consistent with preparations for hijackings or other types of attacks, including recent surveillance of federal buildings in New York.

The FBI is conducting approximately 70 full field investigations throughout the US that it considers Bin Ladin-related. CIA and the FBI are investigating a call to our Embassy in the UAE in May saying that a group of Bin Ladin supporters was in the US planning attacks with explosives.



Declassified and Approved
for Release, 10 April 2004

**September 17, 2001**

**Memorandum From: Assistant Secretary, Tax Policy, Mark A. Weinberger**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: Proposed Tax Cut**

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

ASSISTANT SECRETARY

September 17, 2001

MEMORANDUM FOR SECRETARY O'NEILL

FROM: MARK A. WEINBERGER MAW
ASSISTANT SECETARY (TAX POLICY)

SUBJECT: Economic Stimulus – Process May Trump Substance

I am concerned that in an attempt to provide what the Administration believes is the "best" economic stimulus package to accelerate our economic recovery that we risk causing more national harm than good. I am also concerned that Chairman Thomas's efforts to rush through a stimulus package by weeks end could have the same result.

Should the Administration propose a comprehensive expansive tax cut proposal, without bipartisan input and support, I believe we risk opening up partisan wounds and fighting in a time when that risk, perhaps above all, could be most devastating to our national healing.

Process is often as important to successfully enacting policy prescriptions as the policies themselves. I believe that any large tax cut proposal that is not a product of consultation with Democratic leadership will begin to unravel the fragile trust and bipartisanship we are currently experiencing. No issue this year has been more divisive than taxes.

Accordingly, I believe the President has a fundamental choice to make before turning towards the substance of any relief package. Should the President lead by proposing his own new initiative to Congress and the American people or should he lead by convening appropriate Congressional leadership to craft a bipartisan economic package to be championed by the President and Congressional leaders of both parties? I believe the second approach is not only more appropriate but will ultimately prove more successful.

If the latter approach is adopted, the President would look statemanly, the goodwill that transcends to other policy initiatives would likely continue and the result would be a product all policy leaders will ultimately sell.

**September, 2001**

**Memorandum From: Chris Smith**
**To: Secretary  of the Treasury, Paul O'Neill**

**RE: Economic Policy Meeting**

Information

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**MEMORANDUM FOR SECRETARY O'NEILL**

**FROM:** Chris Smith

**SUBJECT:** Greenspan, Rubin, Lindsey meeting with Congressional Leaders

On Thursday afternoon, Congressional leaders met to discuss the current state of the economy and possible responses with Federal Reserve Chairman Alan Greenspan, Former Secretary Robert Rubin, and Larry Lindsey. Congressional participants included Speaker Hastert, House Minority Leader Gephardt, House Majority Leader Armey, Senate Majority Leader Daschle, and Senate Republican Leader Lott. A short overview and a more detailed report follow.

**Highlights**

- Greenspan essentially asked for a two-week delay on action on a stimulus package. He said he needed that time to sort out the temporary vs. long term impact of the event on the economy, and whether the primary weakness is on the consumer or business side of the economy. He generally questioned what the long term "net effect" of a stimulus would be. The only specific idea he said had been looking at way to treat more "medium size" businesses as subchapter S corporations, to avoid double taxation of dividends.
- Rubin agreed that it was too early to tell the exact nature of the impact. He said that beyond the short term simulative effect of increased spending, any other stimulus should be immediate, focus on the consumer side, and on those "who have the highest propensity to consume", and "low income people have a 100% propensity to consume." He cautioned in general about too much government intervention in the economy, esp. with the airlines.
- Lindsey said the primary concern was the impact of the event on people's willingness to take risk. He disagreed about waiting before acting on a stimulus. He said we needed to act quickly and attack "risk aversion" on the investment side directly, and said his preferred way is to lower the corporate income tax.
- The Speaker said the group should reconvene again next week.

**Detailed Report**

The Speaker asked the outside experts to give an assessment of the current situation; comment on particular impacted sectors; and suggest what Congress could do in response.

**Greenspan**

The Chairman began with an assessment of conditions prior to Sept. 11. He described the situation as an "adjustment due to downward pressures from asset value deflation." The economy was essentially "dead flat" since Christmas due to a decline in earnings, curtailment in capital expenditures, and inventory reduction. While the business economy was being battered by this reduction in values, a "remarkable" consumer market,

especially in housing was offsetting this. He related housing to consumer spending by observing that a large increase in capital gains on homes were being realized due to turnover in the under $500K housing market, and these gains were somehow being translated into increased consumer spending. He admitted that he did not fully understand this phenomenon. He concluded that we were starting a slight upturn going into Sept. 11.

The shock on Sept. 11 resulted in a pronounced contraction in consumer spending, especially in autos. There were also problems with systems for transfer of funds, which the Fed dealt with by entering into large swaps to provide the needed liquidity. That process has now essentially been reversed, and the Fed's balance sheet has returned to a normal position. He is now observing a significant positive "unification impact" in the markets (large than during the Gulf War). Conversely, there has been a significant disruption to operations dependent on "just in time" inventory, especially due to restrictions along the Canadian border. He believed that it would take several weeks to determine the full impact of the shock for policy purposes.

He questioned what the long term "net" impact would be of any short term "gross" stimulus, and pointed out that long term interest rates had already gone up. This would further hurt home sales now, and therefore consumption. If fiscal restraint disappears (by spending too much money on stimulus), then long term rates would go up even further.

When pressed by Gephardt, Greenspan asked the Leaders to hold off action for at least 2 weeks. He said he needed that time to sort out the temporary vs. long term impact of the event on the economy. He cited the fact that communications, air traffic, and the Canadian border crossings all essentially froze on Sept. 11, and needed time to rebound. He also wants to further analyze whether the primary weakness is on the consumer or business side of the economy.

Interestingly, at the very end of the meeting, he offered that he had been looking at the idea of treating more "medium size" businesses (which he claimed had the most opportunity for expansion) as subchapter S corporations, as a novel way to avoid double taxation of dividends. This left the group somewhat intrigued.

**Rubin**

He noted that the impact of the event was being felt not only here, but also in economies around the world. Citibank data indicated that credit card sales have been off substantially since Sept. 11. With respect to the airlines, he said that Congress was overreacting, because the industry had such problems going into the event. He urged them not to do a big bailout, and policy should be based on what the realistic long-term prospects were for the industry. (Lindsey said the industry was aiming to return to 80% of prior capacity by 2002—a bit optimistic.) For insurance, he said that the industry had the capacity to raise rates to compensate for losses, so there was not need for federal action.

With respect to the question of stimulus, he believed that it was too early to tell what the longer-term implications were. He said that the expected increase in government spending would have at least a short-term stimulative impact. He suggested that the spending impact should be evaluated before taking any other stimulus action. If further action is taken, it should be immediate, focus on the consumer side, and on those "who have the highest propensity to spend." He later added "low income people have a 100% propensity to consume." Finally, he cautioned them to avoid "nationalizing the economy."

**Lindsey**

He believed the biggest impact of the event was on the willingness of people to take risk. Previously, this was abnormally high, e.g., people willing to invest in Internet start-up companies that had no assets and no earnings. Now, there is an unwillingness to take any risk at all. He believed that this would take a long time to recover from. This is impacting the travel, restaurant, and hotel industries particularly hard, with business down by about half. The U.S. economy had gotten used to a very high level of efficiency in transportation and distribution ("just in time"), which is essentially now stopped.

Because of this, he disagreed on the ability to wait before taking action on stimulus. He believed that we needed to act quickly to attack the new risk aversion directly and restore confidence. This lead him to favor a temporary cut in the corporate tax rate as the most direct approach. (Rubin questioned the effect a cut in corporate rates would have on the consumer side, i.e., if there isn't any customer demand, then businesses still won't invest).

**Congressional Leaders**

Daschle asked about whether "investment" in infrastructure would act as a stimulus, and about redoing the tax cut to more "front-load" it and reduce the back-end cost. (Not surprisingly, these are the ideas being pushed by Senators Byrd, and Conrad, respectively). Greenspan poured cold water on the first suggestion (see above), and Lindsey left door open a bit on the latter (speeding up the rate cuts and shortening the sunset).

Lott raised concerns about waiting too long before acting on a stimulus, and then belatedly finding out that the economy was far worse than originally thought. In addition to support for the airlines, Armey raised the prospect of looking at other issues in this context, such as TPA and energy legislation. (Rubin and Greenspan both endorsed action on TPA.) The main point Gephardt made was about the need to act together as a "national unity government" to get through the crisis (i.e., "we can't go back to our old ways"). The Speaker concluded the meeting by suggesting that the group reconvene next week.

October 1, 2001

Defense Intelligence Agency Report

Re: Political climate of Afghanistan; The Assassination of Ahmad Shah Masoud in relationship to the September 11attacks.

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CONTROLS
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SERIAL: (U) IIR [redacted]

TEXT
COUNTRY: (U) AFGHANISTAN (AF), PAKISTAN (PK).
IPSP: (U) [redacted] (b)(2)

COMBINE: COMPLETE

SUBJ: IIR [redacted] /VETERAN AFGHANISTAN (b)(2)
TRAVELER'S ANALYSIS OF AL QAEDA AND TALIBAN MILITARY, POLITICAL (b)(2)
AND CULTURAL LANDSCAPE AND ITS WEAKNESSES ~~(S/[redacted]~~

WARNING: (U) THIS IS AN INFORMATION REPORT, NOT FINALLY EVALUATED INTELLIGENCE. REPORT CLASSIFIED ~~S E C R E T NOFORN.~~

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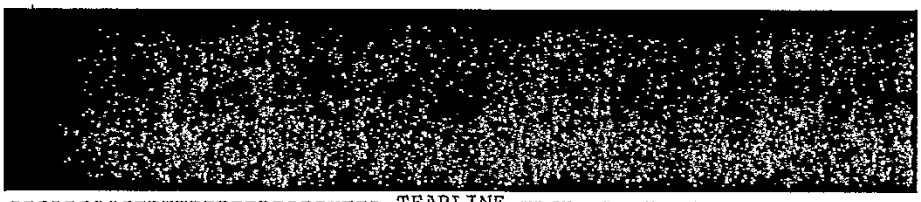
DEPARTMENT OF DEFENSE

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DOI: (U) 20010924.
REQS: (U) [redacted] (b)(2)
SOURCE: ~~(S/NF)~~ [redacted] (b)(1)

SUMMARY: ~~(C/[redacted]~~ PAKISTAN INTRODUCED THE TALIBAN TO PROJECT (b)(2)
ITS POLITICAL INFLUENCE IN AFGHANISTAN. THEIR PLAN FAILED AFTER SEVERAL ATTEMPTS AND RESULTED IN LOSING CONTROL OF ALL THE FACTIONS INVOLVED. THE AL QAEDA AGENDA IN AFGHANISTAN DIFFERS SIGNIFICANTLY FROM THAT OF THE TALIBAN AND THE AFGHANI PEOPLE.

TEXT: 1. (S [redacted] (b)(1) (b)(2)



(b)(1)

TEARLINE

2. ~~(C/~~ [redacted] POLITICAL HISTORY OF AFGHANISTAN. DURING THE SOVIET-AFGHAN WAR THE WEST PREFERRED TO MAINTAIN A POLICY OF DENIABILITY AND ALLOWED PAKISTAN TO HANDLE THE DAILY ADMINISTRATION OF THE WAR, CASH, AND ARMS DISTRIBUTION. IT WAS A TASK PAKISTAN CARRIED OUT WITH GREAT ENTHUSIASM AND THEY HELPED THEMSELVES TO A GENEROUS PORTION OF CASH AND ARMS. THE PAKISTAN GOVERNMENT ALSO HAD A HIDDEN AGENDA. SHOULD THE SOVIETS EVER LEAVE THEY WOULD HAVE TO CONTEND WITH SOMETHING THE WEST DID NOT HAVE TO DEAL WITH. IT WAS STILL GOING TO BE IN PAKISTAN, WITH ALL TIDES AND CURRENTS OF REGIONAL PROBLEMS. UNLIKE THE WEST, THEY WERE CONCERNED WITH WHAT WOULD HAPPEN AFTER THE WAR TO ENSURE INFLUENCE OVER ANY GOVERNMENT THAT CAME TO POWER IN AFGHANISTAN AFTER A SOVIET WITHDRAWAL PAKISTAN DECIDED TO DIRECTLY INFLUENCE THE OUTCOME. RATHER THAN ALLOW THE MOST GIFTED AFGHAN COMMANDERS AND PARTIES TO FLOURISH, WHO WOULD BE HARD TO CONTROL LATER, PAKISTAN PREFERRED TO GROOM THE INCOMPETENT ONES FOR THE ROLE OF FUTURE LEADERS OF AFGHANISTAN. BEING INCOMPETENT THEY WOULD BE WHOLLY RELIANT ON PAKISTAN FOR SUPPORT. THE PRINCIPAL BENEFICIARY OF THIS POLICY WAS GULBADIN ((HEKMATYR)). HIS CREDENTIALS WERE THAT OF AN ANTI-WESTERN ISLAMIC FUNDAMENTALIST WHO REPORTEDLY BOASTED ABOUT THROWING ACID IN THE FACES OF WOMEN WHO DID NOT WEAR THE TRADITIONAL ALL COVERING AFGHAN CHADOR AT KABUL UNIVERSITY. (b)(2)

A. ~~(C/~~ [redacted] ARAB INTRODUCTION. IN TANDEM WITH FAVORING THE INCOMPETENT HEKMATYR OVER MORE ENTERPRISING AND GIFTED COMMANDERS (SUCH AS THE AHMAD SHAH ((MASSOUD)), THE TADJIK COMMANDER FROM NORTHERN AFGHANISTAN), PAKISTAN ALSO ENCOURAGED, FACILITATED AND OFTEN ESCORTED ARABS FROM THE MIDDLE EAST INTO AFGHANISTAN. EVENTUALLY A SPECIAL FACILITY WAS CONSTRUCTED IN ZAHWA (CNA), IN PAKTIA PROVINCE, WITH PAKISTAN INTER-SERVICES INTELLIGENCE DIRECTORATE (ISI) FUNDING. THE LOCAL AFGHAN MUJAHIDEEN COMMANDER WAS JALALUDIN ((HAQANI)). AS AN INFLUENTIAL TRIBAL LEADER FROM PAKTIA, HAQANI WAS ABLE TO NEGOTIATE THE USE OF THE LAND FROM THE JADRAN TRIBE HE BELONGED TO. (b)(2)

B. ~~(C/~~ [redacted] THE CIVIL WAR. IN THE WAKE OF THE SOVIET WITHDRAWAL IN 1989, CAME CIVIL WAR BETWEEN THE REMNANTS OF THE AFGHAN COMMUNIST GOVERNMENT AND AFGHAN MUJAHIDEEN GROUPS THAT WERE FORCED INTO AN UNHAPPY ALLIANCE. THIS PERIOD INVOLVED VERY CASUALTY HEAVY FIGHTING UNDER PAKISTAN ISI, MOST NOTABLY IN ATTACKS ON JALALABAD / [redacted] (b)(2)

C. ~~(C/~~ [redacted] ARABS IN AFGHANISTAN. "VISITORS" FROM THE MIDDLE EAST HAD BEEN IN EVIDENCE SINCE THE VERY EARLY PART OF THE SOVIET-AFGHAN WAR. HOWEVER, THEY LACKED NUMBERS, CONFIDENCE, EXPERIENCE, OR BONDING TIES SUFFICIENT TO GIVE THEM A SEPARATE IDENTITY FROM THEIR HOSTS. THIS WAS ALLOWED TO EVOLVE OVER A PERIOD OF TIME, WHICH WAS EFFECTIVELY THE INCUBATION OF AL QAEDA. FOR THE FIRST TIME, LARGER NUMBERS OF ARABS WERE OBSERVED IN AFGHANISTAN DURING THE SOVIET WITHDRAWAL. ONE OF THE KEY FEATURES OF THE PAKTIA (b)(2)

BORDER PROVINCE, IN WHICH THEY WERE FIRST ESTABLISHED, WAS THAT IT HAD NO RUSSIANS. THE EARLY PHASE OF INVOLVEMENT WAS ABOUT PERCEPTIONS RATHER THAN ACTIONS. AT THAT POINT THE ARAB VISITORS WERE LARGELY LINKED AND RELIANT ON HAQANI'S MUJAHIDEEN IN PAKTIA.

D. ~~(C/~~ [redacted] THE FAILURE OF HEKMATYR. WHEN KABUL FINALLY FELL IT WAS AHMAD SHAH ((MASSOUD)) WHO CAPTURED IT, NOT HEKMATYR, THE INCOMPETENT ZEALOT FAVORED BY PAKISTAN. PAKISTAN COULD NOT ACCEPT THIS RESULT AND THE FRAGILE AFGHAN COALITION GOVERNMENT BEGAN ANOTHER CIVIL WAR, WITH THE PAKISTAN STOOGE (HEKMATYR) BEING BACKED TO SEIZE TOTAL POWER. IN THE END PAKISTAN WAS PROVED RIGHT ABOUT ONLY ONE THING, HEKMATYR WAS INCOMPETENT. HE WAS NEVER ABLE TO WREST KABUL FROM MASSOUD, DESPITE MASSIVE LOGISTICAL AND MATERIAL (INCLUDING MANPOWER) SUPPORT FROM PAKISTAN. AGAINST THIS FAILURE IT SHOULD BE NOTED THAT PAKISTAN HAS LOST EVERY WAR IT HAS EVER FOUGHT. (b)(2)

3. ~~(C/~~ [redacted] INTRODUCTION OF THE TALIBAN (LEBANONIZATION). AFTER YEARS OF FUTILE EFFORT, WHICH EFFECTIVELY SAW THE LEBANONIZATION OF AFGHANISTAN, PAKISTAN FINALLY ABANDONED HEKMATYR. HOWEVER, NOT IN FAVOR OF A MORE RATIONAL POLICY, INSTEAD THEY SET ABOUT DOING THE SAME THING ALL OVER AGAIN. THEY CREATED ANOTHER FORCE THEY HOPED TO HAVE BETTER CONTROL OVER THAN HEKMATYR'S RABBLE. IT WAS CALLED TALIBAN, THE ARABIC NAME "TALIB" BEING LITERALLY TRANSLATED AS "ASKER" OR "SEEKER". TALIBAN MEANING "THE SEEKERS". SIGNIFYING A STUDENT OF DIVINITY. THIS INSPIRED TITLE HELPED CLOAK PAKISTAN'S HIDDEN AGENDA IN A NEW ISLAMIC COAT. (b)(2)

A. ~~(C/~~ [redacted] TO LEAD THE TALIBAN PAKISTAN CHOSE MULLAH MOHAMMAD ((OMAR)), WHO WAS WILLING TO DO AS HE WAS TOLD. ACCORDING TO TALIBAN PROPAGANDA THE MULLAH WAS DIVINELY INSPIRED TO RID AFGHANISTAN OF THE TROUBLESOME WAR AND WARLORDS. AFGHANISTAN WAS BLIGHTED WITH BOTH, LARGELY DUE TO YEARS OF CIVIL WAR SPONSORED BY PAKISTAN AND RELIANT ON THE STOCKPILE OF ARMS PLUNDERED FROM A COVERT WESTERN ARMS PIPELINE FROM THE OLD SOVIET-AFGHAN WAR DAYS. THE MULLAH EMERGED WITH A FULLY FUNCTIONING, FULLY ARMED CONVENTIONALLY EQUIPPED, FULLY TRAINED MILITARY FORCE PRONE TO LARGE SCALE CONVENTIONAL ACTIONS. OMAR'S EMERGENCE IS CREDITED TO PAKISTAN ISI ACTIONS. THE ISI PRESSURED HAQANI TO UNDERTAKE ACTION AGAINST MATUN (b)(2) [redacted] (THE PRINCIPAL TOWN IN KHOST, PAKTIA PROVINCE).

B. ~~(C/~~ [redacted] TALIBAN PREVAIL. WITH HAQANI'S POORLY TRAINED PEASANT MUJAHIDEEN THERE WAS BOTH GREAT LOSS OF AFGHAN LIFE AND REPEATED FAILURE. IN THE WAKE OF THE SOVIET WITHDRAWAL, ISI ALSO ORCHESTRATED AND DIRECTED THE SAME FAILED STRATEGIES AGAINST JALALABAD, WITH EVEN HEAVIER AFGHAN CASUALTIES. THE REPEATED PRONOUNCED PATTERN UNDER ISI DIRECTION HAS BEEN TO IGNORE THE POORLY TRAINED GUERRILLA NATURE OF THE AFGHAN MUJAHIDEEN AND PRESS THEM TO CONDUCT CONVENTIONAL-STYLE ENGAGEMENT, THE SAME STYLE THAT TALIBAN ARE CREDITED WITH LEARNING FROM THE KORAN. AS A RESULT OF THESE ACTIONS, THE FULLY SUPPORTED (BY PAKISTAN) TALIBAN PREVAILED OVER THE UNSUPPORTED LEGITIMATE GOVERNMENT OF AFGHANISTAN. (b)(2)

4. ~~(C/~~ [redacted] THE ENEMY AS TALIBAN. THE TALIBAN IS ESSENTIALLY IMPORTANT TO AL QAEDA BUT IS NOT A NATURAL AFGHAN PHENOMENON. WHILE IT HAS SWAY OVER 90 PERCENT OF AFGHANISTAN, IT DOES NOT HAVE 90 PERCENT OF THE POPULAR SUPPORT. AS SUCH ITS ROOTS ARE NOT THAT DEEP AND NEED NOT REPRESENT THE FUTURE OF AFGHANISTAN. EXPLOITING THE DIFFERENCES BETWEEN AL QAEDA AND TALIBAN CAN BE MADE TO WORK

AGAINST AL QAEDA.

5. ~~(C/~~ [redacted] INTRODUCTION OF THE TALIBAN. THE TALIBAN IS NOT SYNONYMOUS WITH AFGHANISTAN. IT WAS CREATED, IMPOSED AND RECOGNIZED BY PAKISTAN IN PURSUIT OF ITS OWN INTERESTS. PLAYING THE ISLAMIC FUNDAMENTALIST CARD AS A MEANS OF SECURING CONTROL OVER A COMPLIANT PROXY REGIME IN NEIGHBORING AFGHANISTAN HAS SERIOUSLY BACKFIRED. PAKISTAN HAS ALSO LOST CONTROL OF THE TALIBAN, WHO ARE PROVING TO BE BOTH UNPREDICTABLE AND UNGRATEFUL. UNDER THE SHADE OF THE TALIBAN UMBRELLA THE BIN LADEN BRAND OF EXTREMISM HAS BEEN ABLE TO GROW UNMOLESTED INSIDE AFGHANISTAN. (b)(2)

a. ~~(C/~~ [redacted] TALIBAN WEAKNESSES. WESTERN POLICY STRIVES TO FIND A UNITY OF ORDER IN AFGHANISTAN; HOWEVER, THE PREVAILING TREND IS A UNITY OF CHAOS. USED TO ORDER WESTERNERS SEE CHAOS AS FAILURE. IT IS AN ALTERNATE SYSTEM ALIEN TO WESTERN THOUGHT, BUT DOES NOT MEAN IT CANNOT WORK. AS SUCH IN THE MARTIAL ARENA CHAOS, ITS CREATION AND EXPLOITATION SHOULD BE PART OF ALLIED STRATEGY. IN ADDITION, THE MEDIA ARE WIDELY DESCRIBING THE TALIBAN REGIME AS UNPREDICTABLE. IT IS, BUT ONLY TO THOSE WHO DO NOT UNDERSTAND IT. SEEN FROM THE TALIBAN'S VIEW, THEIR DECISION MAKING PROCESS IS PREDICTABLE.

7. ~~(C/~~ [redacted] THE WIDE DIVIDE. THERE IS A LARGE DIVIDE BETWEEN WESTERN AND AFGHAN PERCEPTIONS, ATTITUDES AND METHODS. UNDERSTANDING THEM MATTERS. IT IS ALSO IMPORTANT TO REALIZE THERE ARE FOUR VERY DIFFERENT AGENDAS AT ISSUE. (b)(2)

A. ~~(C/~~ [redacted] UNITED FRONT. ALSO KNOWN AS THE NORTHERN ALLIANCE, IT SUPPORTS AN INDEPENDENT AFGHAN STATE, ISLAMIC IN NATURE AND BASED ON AFGHAN IDEALS. HOWEVER, THE CONFLICT HAS FAR MORE TO DO WITH DEEP ETHNIC AND CULTURAL DIVIDES BETWEEN THE PRINCIPAL GROUPS THAN DIFFERENCES OF OPINION ON ISLAMIC INTERPRETATIONS. THESE ARE THE CRACKS THAT PAKISTAN SUCCESSFULLY EXPLOITED IN CREATING THE TALIBAN. ON THE GROUND THE WAR BETWEEN UNITED FRONT AND TALIBAN IS NOT A WAR ABOUT INTERPRETATIONS OF ISLAM. IT IS ABOUT ETHNIC DIFFERENCES AND HISTORICAL ROOTS. THE TADJIKS OF THE NORTH ARE OUTNUMBERED BY THE PUSHTOONS. WHILE THE WEST SEES AFGHANISTAN AS A SINGULAR NATION FEW AFGHANS HAVE ANY REAL GRASP OF THIS CONCEPT. TO MOST OF THE PUSHTOONS, THE TADJIKS ARE SIMPLY UNTRUSTWORTHY NORTHERNERS UNABLE TO SPEAK PUSHTU. THE UNITED FRONTS AREA OF CONTROL HAS GRADUALLY BEEN ERODED BECAUSE THEY ARE OUTNUMBERED AND POORLY SUPPORTED. (b)(2)

B. ~~(C/~~ [redacted] TALIBAN AGENDA. THE TALIBAN AGENDA IS THE COMPLETE CONTROL OF AFGHANISTAN, USING WHATEVER MEANS NECESSARY TO ACHIEVE THIS GOAL. THIS IS PRINCIPALLY RELIANT ON LOGISTIC AND MATERIAL SUPPORT FROM PAKISTAN. IT HAD BEEN CREATED BY PAKISTAN EXPLOITING POWERLESS AFGHAN FUNDAMENTALIST INDIVIDUALS AND FACTIONS BY DANGLING IN FRONT OF THEM THE PROMISE OF AN ISLAMIC STATE MOLDED TO THEIR DESIGN SPECIFICATIONS. THIS, AND CASH, ENCOURAGED ENOUGH RECRUITS TO CLOAK THE TALIBAN WITH SEEMINGLY IMPECCABLE ISLAMIC CREDENTIALS.

C. ~~(C/~~ [redacted] THE AFGHANI STYLE OF ISLAM. THE FUNDAMENTALIST HABITS THE TALIBAN ESPOUSED ARE LARGELY ALIEN TO THE MAJORITY OF AFGHANS WHO TRADITIONALLY PRACTICED A FAIRLY RELAXED INTERPRETATION OF ISLAM. AFGHANI PRACTITIONERS OF ISLAM ENJOYED MUSIC, DANCING, RADIO, AND SPORTS. THE DEGREES OF PRACTICING MUSLIMS NATURALLY VARIED BETWEEN URBAN AND RURAL DWELLERS WITH WOMEN AT KABUL UNIVERSITY AND A MORE RIGID USE OF PURDAH IN THE (b)(2)

REMOTER COUNTRYSIDE.

D. ~~(C/~~ [redacted] THE PROMISE OF THE TALIBAN. THE ATTRACTION TO THE TALIBAN AMONG THE ALMOST DESTITUTE AFGHAN POPULATION WAS LESS IN ITS ISLAMIC CREDENTIALS THAN ITS PROMISE OF AN ALTERNATIVE TO A PROTRACTED WAR. IT WAS AT THE TIME A CONFLICT THAT HAD FAR EXCEEDED ITS POPULAR LIFE SPAN BUT WAS BEING ARTIFICIALLY PROLONGED BY OUTSIDE SPONSORS IN PURSUIT OF THEIR OWN AGENDA. HOWEVER, WHILE STILL HEAVILY RELIANT ON PAKISTAN SUPPORT, THE TALIBAN HAS NOW REMAINED IN POWER LONG ENOUGH TO DEVELOP AN INDEPENDENT MOMENTUM AND AUTONOMY NEVER ENVISIONED BY THEIR CREATORS. THIS MAKES IT INCREASINGLY DIFFICULT FOR PAKISTAN TO MAINTAIN THE RIGID CONTROL THEY HAD IN MIND. THE TALIBAN CREATED, IMPOSED AND RECOGNIZED BY PAKISTAN PROVED UNPREDICTABLE AND UNGRATEFUL. (b)(2)

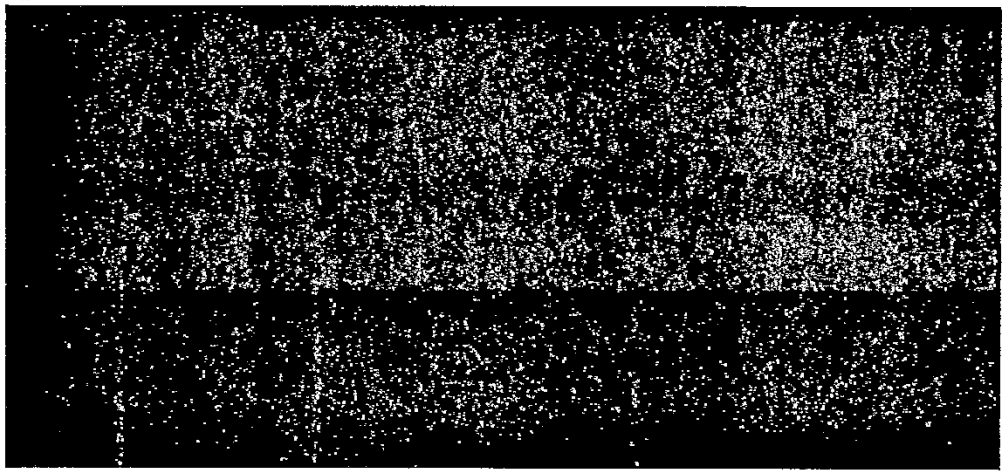
8. ~~(C/~~ [redacted] OSAMA BIN LADIN'S AL QAEDA. THE AL QAEDA AGENDA IN AFGHANISTAN DIFFERS SIGNIFICANTLY FROM THAT OF THE TALIBAN. THEY ARE NOT ABOUT CREATING AN INDEPENDENT AFGHAN ISLAMIC STATE. LONG TERM THERE CAN BE NO ROOM FOR TALIBAN IN THEIR AMBITIONS. HAVING BEING ARTIFICIALLY INTRODUCED TO THE REGION AND ENCOURAGED IN THEIR AMBITIONS SO FAR THEY HAVE GROWN IN CONFIDENCE AND STATURE. TALIBAN ACCEPTANCE AND APPROVAL OF FUNDAMENTALIST NON-AFGHANS AS PART OF THEIR FIGHTING FORCE WERE MERELY AN EXTENSION OF PAKISTANI POLICY DURING THE SOVIET-AFGHAN WAR. IT IS VERY IMPORTANT TO REALIZE THAT MEMBERS OF 055 BRIGADE MIGHT SERVE WITH TALIBAN FORCES, BUT THEY ARE NOT IN ANY WESTERN SENSE INTEGRATED. THEY REMAIN RATHER LIKE AN INTERNATIONAL BRIGADE, DIFFERENT IN LANGUAGE, HABIT AND IN THE INTERPRETATION OF ISLAM. ADDITIONALLY, THEIR VISION OF THE FUTURE OF AFGHANISTAN DIFFERS. (b)(2)

9. ~~(C/~~ [redacted] PAKISTAN AGENDA. PAKISTAN'S GOALS ARE SIMPLE, THE CONTINUANCE OF THE POLICY THEY HAVE ALWAYS DEMONSTRATED REGARDING AFGHANISTAN. IT IS FAILING WITH THE TALIBAN AND IT CANNOT SUCCEED UNDER ANY AFGHAN GOVERNMENT CONTROLLED BY AL QAEDA. THE REPERCUSSIONS FROM PAKISTAN'S ATTEMPT TO MANIPULATE THE ISLAMIC CARD IS ONLY JUST SURFACING. IN ISLAMABAD THEY HAVE TRIED TO IGNORE OR BURY THE EVIDENCE FOR SOME TIME. IT MUST BE A DEEPLY TROUBLING PERIOD FOR GENERAL ((MUSHARRAF)) IN PAKISTAN, WHO IS ASKED TO HELP HUNT DOWN THE CULPRITS THAT HE HELPED TO ESTABLISH AND SUPPORTED. NOT TO SUPPORT THE U.S. INVITES TROUBLE AND TO ASSIST THE U.S. TO THEIR AIMS ALSO PRESENTS PROBLEMS TO PAKISTAN. THE QUANDARY LEAVES THE PAKISTANIS CONFUSED AS TO HOW THEY MIGHT BE ABSOLVED WITHOUT PERMANENTLY SHATTERING THEIR REGIONAL ASPIRATIONS OR THEIR GOVERNMENT.

10. ~~(C/~~ [redacted] THE TALIBAN HAD LITTLE TIME TO THINK THROUGH WHAT THE PRICE OF AL QAEDA SUPPORT MIGHT MEAN IN THE LONG TERM. THE TALIBAN WAS FOCUSED ON THE DESTRUCTION OF THE UNITED FRONT AND OTHER OPPOSITION FACTIONS. HOWEVER, DEMANDS TO DELIVER BIN LADEN MAY HAVE ALREADY BROUGHT ABOUT THE REALIZATION THAT THE TALIBAN ARE NO LONGER IN A POSITION TO DEMAND ANYTHING OF AL QAEDA. INTRIGUE AND PARANOIA ARE AFGHAN HABITS, AND WELL WORTH EXPLOITING. (b)(2)

11. ~~(C/~~ [redacted] DEATH OF AHMAD SHAH ((MASSOUD)). AHMAD SHAH ((MASSOUD)) WAS VERY UNASSUMING AND SOFTLY SPOKEN (IN FARSI, PUSHTO, URDU AND FRENCH). HE WAS THE CHIEF RIVAL OF TALIBAN AND THE CHIEF THORN IN AL QAEDA'S AMBITIONS AS WELL. MASSOUD'S DEATH SERVED BOTH TALIBAN AND AL QAEDA. UNLIKE THE TWIN TRADE TOWERS THE (b)(2)

MURDER OF MASSOUD WAS A NO-LOSE SCENARIO FOR AL QAEDA. GENERAL MOHAMMAD ((FAHIM)) IS RECORDED AS THE NEW COMMANDER OF MASSOUD'S UNITED FRONT. WHETHER HE CAN KEEP IT UNITED REMAINS TO BE SEEN.
12. ~~(C//~~ [redacted] HUMANITARIAN AID. SELECTIVE ALLIED HUMANITARIAN AID, STRICTLY MONITORED AND BEYOND TALIBAN CONTROL, WOULD REAP ENORMOUS BENEFITS IN THE ERADICATION OF AL QAEDA INSIDE AFGHANISTAN. JUST BOMBS, NO MATTER HOW SURGICAL THE STRIKE, CONVEYS TO THE AFGHAN MIND NO DISTINCTION BETWEEN THE AFGHAN AND THE ENEMY. AND YET ANY LONG LASTING RESOLUTION IS RELIANT ON ENSURING THAT DISTINCTION IS MADE, UNDERSTOOD AND APPRECIATED NOT ONLY BY THE ALLIES BUT BY LOCAL POPOLATIONS TO WHICH THE ENEMY PARASITICALLY ATTACH THEMSELVES. (b)(2)



(b)(1) (b)(2)

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PREP: (U)
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October 2, 2001

Defense Intelligence Agency Report

RE: Status of the Taliban and al-Qaeda in Afghanistan; War Strategy

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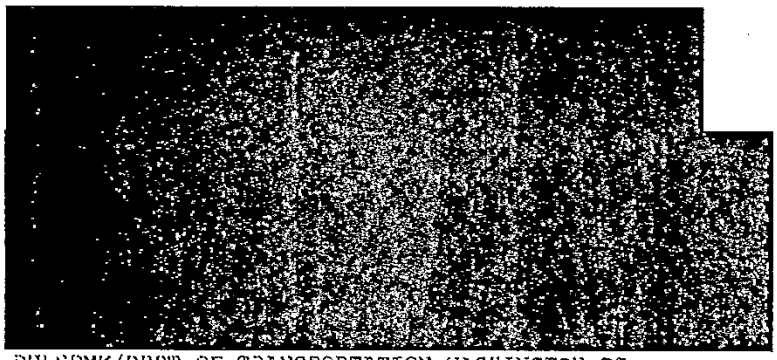
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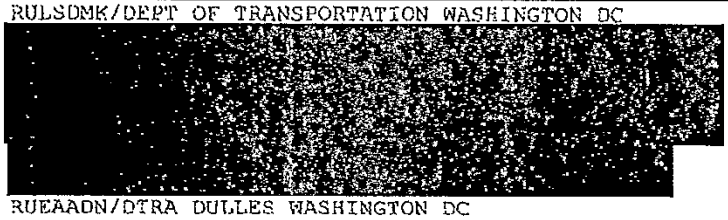
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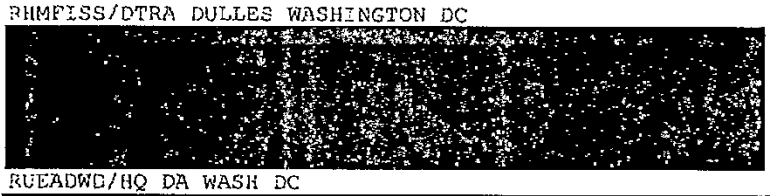
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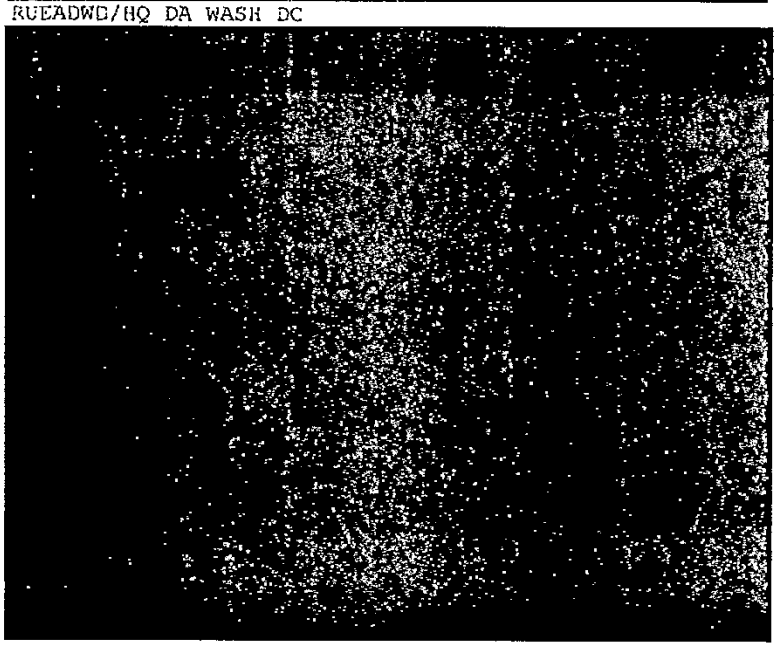
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CONTROLS
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TEXT
COUNTRY: (U) AFGHANISTAN (AF), PAKISTAN (PA).
IPSP: (U) [redacted] (b)(2)

COMBINE: COMPLETE

SUBJ: IIR [redacted] /VETERAN AFGHANISTAN (b)(2)
TRAVELER'S ANALYSIS OF AL QAEDA AND TALIBAN EXPLOITABLE WEAKNESSES
~~(C/~~ [redacted] (b)(2)

WARNING: (U) THIS IS AN INFORMATION REPORT, NOT FINALLY EVALUATED INTELLIGENCE. REPORT CLASSIFIED ~~S E C R E T NOFORN.~~

DEPARTMENT OF DEFENSE

DOI: (U) 20010924.
REQS: (U) [redacted] (b)(2)

SOURCE: ~~(S/NF)~~ [redacted] (b)(1)

SUMMARY: ~~(C/~~ [redacted] EVENTUALLY THE TALIBAN AND AL QAEDA WILL WAR WITH EACH OTHER. THE WEAKNESS OF BOTH IS IN THE MINDS OF THE INDIVIDUALS THAT BELONG TO THE GROUPS AND IN THE POWER THAT IS GIVEN TO THEM BY THEIR NAMES. AL QAEDA HAVE NOT INTEGRATED WITH AFGHANIS OR THE TALIBAN, LEAVING THEM SUSCEPTIBLE TO EXPLOITATION. (b)(2)

1. TEXT ~~(C/~~ (b)(2)

[redacted] (b)(1)

TEARLINE

2. ~~(C/~~ [redacted] BACKGROUND. ANY ALLIED FORCE, SMALL OR LARGE, WILL HAVE TO LEARN TO THINK OUTSIDE THE ENVELOPE IN DEALING WITH (b)(2)

THE SITUATION IN AFGHANISTAN. IN ANY JOINT STRATEGY THERE IS A NEED FOR THOSE WHO, BY VIRTUE OF PAST EXPERIENCE, MIGHT OFFER ALTERNATE INTERPRETATIONS, PERSPECTIVES AND INSIGHTS NOT BASED ON REMOTE STUDY OR SPECULATIVE ASSUMPTIONS. IT IS IMPERATIVE TO DERIVE THIS INFORMATION FROM HUMAN RESOURCES, (WHERE THE WESTERN NATIONS ARE WEAKEST) WHO NOT ONLY KNOW WHERE KABUL, KANDAHAR, KHOST AND KHAGA WAGA MIGHT BE ON A MAP BUT ALSO KNOW WHAT THEY SMELL LIKE WHEN YOU GET THERE. THE GRAVEST APPREHENSION AT THIS POINT IS THE LACK OF CLEAR DISTINCTION, OR UNDERSTANDING BETWEEN AFGHANS, UNITED FRONT (SYNONYMOUS TO THE NORTHERN ALLIANCE), TALIBAN, AND OSAMA BIN LADIN'S AL QAEDA. [redacted] (b)(1)

A. ~~(C)~~ [redacted] SEARCH FOR THE ENEMY. TO PLACE THE INFORMATION INTO CONTEXT, THE REMARKS ARE BASED ON THE PRINCIPLE THAT THE DEBATE IS ABOUT A WAR RATHER THAN A SINGLE OR MULTIPLE STRIKE RESOLUTION. IF THIS IS SO AND THE PRESENT FOCUS IS ON RECOGNIZING THE ENEMY AND SEARCHING FOR THE ENEMY'S CENTER OF GRAVITY, THE MOST SERIOUS DANGER LIES IN USING WESTERN POINTS OF REFERENCE AND NOT THE ENEMIES'. IF THE WEST RELIES ON USING ITS POINTS OF REFERENCE, THEN THE BALANCE OF RESOURCES WILL BE GIVEN OVER TO SEARCHING FOR WHAT WESTERNERS MOST EASILY RECOGNIZE. IN THIS THE OBVIOUS CHOICE IS NATION STATE INVOLVEMENT. IT OFFERS WESTERNERS FIXED TARGETS THAT CAN BE EASILY ENGAGED IN THE MANNER WE ARE BEST SUITED FOR AND MOST COMFORTABLE WITH. (b)(2)

B. ~~(C)~~ [redacted] WHILE NATION STATES MAY HAVE SOME INVOLVEMENT, AND THEIR FINGER PRINTS APPEAR TO BE IN EVIDENCE, THEY ARE NOT, IN THIS INSTANCE, THE PRIME ENEMY. THIS WAR HAS BEEN A LONG TIME IN INCUBATION AND NOW HATCHED IS NOT THE WAR BETWEEN NATION STATES WE ARE FAMILIAR WITH. IT IS A WAR FOUGHT ON TWO FRONTS: ONE AGAINST MATERIAL ASSETS AND THE OTHER IN THE MINDS OF MEN. WHILE THE REDUCTION OF MATERIAL ASSETS AND RESOURCES MUST PLAY A PART IN THE WAR CONCENTRATING ON THEM ALONE CANNOT DELIVER LONG TERM SECURITY. IF THE CONCENTRATION OF EFFORT IS UPON THE MATERIAL FRONT IT MISSES A VITAL POINT. IT IS THE MOST VISIBLE, NOT THE MOST IMPORTANT. IT MEANS THE ENEMY WILL HAVE SUCCESSFULLY DRAWN WESTERN PLANNING AND POLICY AWAY FROM WHERE IT SHOULD BE STRONGEST. (b)(2)

3. ~~(C)~~ [redacted] THE MINDS OF MEN FRONT. ULTIMATELY THIS IS THE LARGEST FRONT, THE HARDEST TO FIGHT, AND THE HARDEST TO WIN. IT IS ALSO THE FIRST ONE TO ENGAGE. THE TARGET RESIDES IN THE SECRET POWER OF NAMES. IF WESTERNERS CAN ENGAGE (KILL) IT, THEN THEY HAVE SCORED THE FIRST VICTORY. ENGAGING THE POWER OF NAMES REQUIRES NOTHING BUT AN IDEA TO ACHIEVE IT. HOWEVER, WORSE THAN UNDERRATING THE SIGNIFICANCE, WESTERNERS OFTEN TAKE NO NOTICE IT. YET, A NAME HAS POWER AND INFLUENCE OVER THE FOOT SOLDIERS OF BOTH SIDES. IF THE POWER OF NAMES CAN ADD STRENGTH IT CAN ALSO TAKE STRENGTH AWAY. TAKING AWAY THAT STRENGTH FROM THE ENEMY IS A POSITIVE STEP TOWARDS A VICTORY, AND AN EXPLOITABLE WEAKNESS IN THE MINDS OF AL QAEDA MEMBERS.

A. ~~(C)~~ [redacted] TAKING POWER OF NAMES FROM AL QAEDA. IN THE MINDS (b)(2)
OF THE AL QAEDA, THEY HAD STOLEN THE POWER BESTOWED ON THE UNITED STATES, THEIR PRIMARY ENEMY, BY REPLACING IT WITH A NAME OF THEIR CHOICE, THE GREAT SATAN. BUT THE CHOICE IS A CONSIDERED ONE. IT DOES NOT REDUCE THE FOE TO A PAPER TIGER OF NO CONSEQUENCE. IT RECOGNIZES THE ENEMY IS STILL POTENT AND THEREFORE DANGEROUS,

AFFECTING HOW THEY BEHAVE AROUND IT. EXPLOITING THE PSYCHOLOGICAL ADVANTAGE OF THE CONNOTATION OF GREEN BERET, SCREAMING EAGLE, RED WEAKEN THE PSYCHOLOGICAL ADVANTAGE. THERE ARE DANGERS IN HUMOROUS CHOICES.

B. ~~(C/~~ [redacted] NAMING THE ENEMY. IN SELECTING A NAME FOR THE ENEMY, IT IS ADVISABLE TO CONSIDER WHETHER THEIR NATURE AND HABITS ARE THOSE OF A COLLECTIVE FORCE RATHER THAN THOSE OF AN INDIVIDUAL. THE WESTERN PUBLIC WILL NOT CARE WHAT THE TITLE OF THE ENEMY IS, WHY PROMOTE AL QAEDA'S PREFERRED CHOICE? (b)(2)

C. ~~(C/~~ [redacted] MEASURES TO BE TAKEN. SEEK AN ALTERNATIVE NAME FOR THE ENEMY AND TAKE AWAY AL QAEDA'S CHOICE OF NAMES. GREAT CARE SHOULD BE TAKEN IN SEEKING AN ALTERNATIVE AND AVOID ANY NEGATIVE ISLAMIC STEREOTYPING. WHATEVER THE WIDER TITLE, IT IS PREFERABLE TO THE CULT OF PERSONALITY FOSTERED BY PROMOTING AN INDIVIDUAL SUCH AS OSAMA BIN LADEN. IT WILL CERTAINLY BEGIN TO AGITATE AL QAEDA IF WESTERNERS DO NOT GRANT THEM THE LEGITIMACY OF USING THEIR PREFERRED CHOICE OF NAME. IT IS A SMALL STEP IN EXPLOITING THE PSYCHOLOGICAL WEAKNESSES, WHICH SHOULD BE A FOCUS OF A JOINT WESTERN STRATEGY. (b)(2)

4. ~~(C/~~ [redacted] EXPLOITATION OF AL QAEDA'S FORCE. AL QAEDA LACKS THE CONVENTIONAL MATERIALS, RESOURCES AND TECHNOLOGY WE EXPECT AND SEEK TO EXPLOIT. THEIR FORCE MAY BE WIDELY DISPERSED, WELL DISGUISED AND CAPABLE OF DELIVERING BLOWS OUT OF ALL PROPORTION TO ITS SIZE. HOWEVER, NOT TO LOSE SIGHT OF WHERE THE ANSWERS LIE AND FOR ALL ITS DIFFERENCES, AL QAEDA'S FORCES CANNOT ESCAPE BEING THE SAME AS ALL MILITARY FORCES IN TWO RECOGNIZABLE WAYS: THEY ARE HUMAN AND THEY MAKE MISTAKES. THERE HAVE MADE AT LEAST THREE RECOGNIZABLE AND SIGNIFICANT MISTAKES SO FAR. (b)(2)

A. ~~(C/~~ [redacted] FIRST, MEMBERS OF AL QAEDA IN AFGHANISTAN ARE UNABLE TO AVOID GATHERING IN SUFFICIENT NUMBERS TO PRESENT A TARGET THAT IS RECOGNIZABLE AND WORTHY OF OUR TECHNOLOGICAL ADVANTAGES. EXTENSIVE HUMAN RESOURCES ARE REQUIRED ON THE GROUND TO IMPROVE TARGET ACQUISITION AND MAXIMIZE THE IMPACT OF A STRIKE. THIS FAVORS DEPLOYMENT OF SUITABLE SPECIAL FORCES (SF), PREFERABLY AS THE INTERFACE WITH LOCAL RESISTANCE FORCES, TAKING INTO ACCOUNT THAT DEAD OR CAPTURED SF IN AL QAEDA HANDS REPRESENTS A DISPROPORTIONAL ADVANTAGE OVER WESTERN LOSS. IN THE CASE OF AL QAEDA THEIR HUMAN ARMOR CRACKS CAN BE EXPLOITED AS PART OF A JOINT "MINDS OF MEN" STRATEGY TO ERODE AND DISMANTLE THEM. PROPERLY APPLIED IT COULD MAKE THEIR LIFE IN AFGHANISTAN UNTENABLE. (b)(2)

B. ~~(C/~~ [redacted] SECOND, THE STRENGTH OF THE ENEMY IS NOT IN THE MATERIAL RESOURCES BUT IN ITS HUMAN RESOURCES. TO ENGAGE AL QAEDA, THE WEST MUST LOOK FOR DEFECTS IN AL QAEDA'S HUMAN ARMOR. THIS HUMAN ARMOR DISPLAYS PRONOUNCED HUMAN WEAKNESSES. THE CHIEF CRACK STEMS FROM THE VERY SAME LIMITED IDEOLOGICAL PERSPECTIVE IT DEPENDS ON IN ORDER TO PRODUCE THE FOOT SOLDIERS IT NEEDS. AS A RESULT, ON BOTH A COLLECTIVE AND INDIVIDUAL BASIS, AL QAEDA REGARDS ITSELF AN ELITE FORCE SUPERIOR TO OTHERS. THE EXPLOITABLE WEAKNESS IS AL QAEDA'S INABILITY TO INTEGRATE SUFFICIENTLY WITH THE HOST POPULATION. DESPITE THE RISK OF ATTENTION AND THE RISKS CREATED FOR A COLLECTIVE MISSION, SOME MEMBERS ARE INCAPABLE OF CONCEALING THEIR SENSE OF ELITE SUPERIORITY. IN THIS NEW WAR, WHICH MUST LARGELY TARGET HUMAN RATHER THAN MATERIAL RESOURCES, THE EGO OF THE INDIVIDUAL CAN BE EXPLOITED. (b)(2)

C. ~~(C/~~ [redacted] THIRD, RATHER THAN DISCREET INTEGRATION AND (b)(2)

SUBVERSION FROM WITHIN, AL QAEDA HAVE LARGELY ALLOWED THEMSELVES TO DEFINE THEIR OWN DIFFERENCES WITH THEIR AFGHAN HOSTS. THIS IS A SERIOUS FLAW IN THEIR STRATEGY OF EXPANSION. INITIALLY, AL QAEDA'S PROSPERITY AND GROWTH WERE GAINED THROUGH THE ABUSE OF THE AFGHAN TRADITION OF MELMASTIA, HOSPITALITY. LATER, WITH SUFFICIENT GROWTH, IT RELIED MORE ON CONTROLLING ITS HOST. IN A LAST PHASE IT WILL CONSUME THE HOST AND REPLACE IT, A MOVE BEST MASKED BY A LARGE ISLAMIC BANNER.

D. ~~(C/~~ [redacted] BY FAILING TO FULLY INTEGRATE WITH TALIBAN FORCES AL QAEDA EXTENUATE BOTH THEIR ALIEN OUTLOOK AND ETHNICITY. AFGHANS HAVE SERIOUS PROBLEMS IN DEALING WITH THE DOMESTIC DIVERSITY OF AFGHAN ETHNICITY. THE AL QAEDA REMAIN RATHER LIKE AN INTERNATIONAL BRIGADE, ONE DIFFERENT IN LANGUAGE, HABIT AND INTERPRETATION OF ISLAM (ALTHOUGH BOTH ARE ACTUALLY SUNNI). BY RUNNING THEIR OWN CAMPS AND OPERATIONALLY LUMPING TOGETHER IN THE 055 BRIGADE, AL QAEDA MEMBERS SET THEMSELVES APART. THIS POTENTIAL FOR EXPLOITATION SHOULD NOT BE IGNORED BY WESTERN MILITARY PLANNERS. THE PRIME TARGET MOST SUITED AND DESERVING OF THE CONVENTIONAL FORCE THAT THE ALLIES CAN BRING TO BEAR CAN BE EFFECTIVELY ISOLATED. SUPPORT ON THE GROUND BY THE RIGHT MIX OF ALLIED SF AND LOCAL RESISTANCE WOULD ENABLE THE CREATION OF THE IDEAL WEAPON WITH WHICH TO STRIKE AN OTHERWISE PROBLEMATIC ENEMY, WHICH MIGHT NORMALLY BE BOTH WIDELY DISPERSED AND EFFECTIVELY CONCEALED IN A HOST CIVILIAN POPULATION. (b)(2)

5. ~~(C/~~ [redacted] BIN LADEN'S AL QAEDA NETWORK WAS ABLE TO EXPAND UNDER THE SAFE SANCTUARY EXTENDED BY TALIBAN FOLLOWING PAKISTAN DIRECTIVES. IF THERE IS ANY DOUBT ON THAT ISSUE, CONSIDER THE LOCATION OF BIN LADEN'S CAMP TARGETED BY US CRUISE MISSILES, ZAHAWA (CNA). POSITIONED ON THE BORDER BETWEEN AFGHANISTAN AND PAKISTAN IT WAS BUILT BY PAKISTAN CONTRACTORS FUNDED BY THE PAKISTAN INTER-SERVICES INTELLIGENCE DIRECTORATE (ISI), AND PROTECTED UNDER THE PATRONAGE OF A LOCAL AND INFLUENTIAL JADRAN TRIBAL LEADER, JALALLUDIN ((HAQANI)). HOWEVER, THE REAL HOST IN THAT FACILITY WAS THE PAKISTANI ISI. IF THIS WAS LATER TO BECOME BIN LADEN'S BASE, THEN SERIOUS QUESTIONS ARE RAISED BY THE EARLY RELATIONSHIP BETWEEN BIN LADEN AND PAKISTAN'S ISI. (b)(2)

6. ~~(C/~~ [redacted] THE ACHILLES HEEL OF THE TALIBAN LIES IN ITS GENESIS AND THE MOBILE NATURE OF ITS DEPLOYMENT IN AFGHANISTAN. ONE OF THE REMARKABLE FEATURES OF THE AFGHAN MUJAHIDEEN WHO OPPOSED THE SOVIET OCCUPATION, WAS THAT IT NEVER EVOLVED INTO THE SECONDARY STAGE OF GUERILLA WARFARE, MOBILE GUERRILLA WARFARE. FOR THE VAST MAJORITY OF AFGHAN'S MUJAHIDEEN THE WAR REMAINED A LOCALIZED EVENT. IN A COUNTRY OF DIVERSE CULTURES AND LANGUAGE WITH DEEP HISTORICAL ENMITIES BETWEEN COMMUNITIES AND INDIVIDUALS THERE IS NO SENSE OF NATIONAL IDENTITY. AS A RESULT THE MASS MOBILITY OF THE TALIBAN, ONLY POSSIBLE THROUGH THE SUPPORT OF THOSE MADE THEM, HAS GENERATED A CIVIL WAR OF UNBRIDLED FEROCITY. THE TALIBAN FORCES FEEL NO SENSE OF SHARED IDENTITY WITH POPULATIONS FROM OTHER PARTS OF AFGHANISTAN.

7. ~~(C/~~ [redacted] THERE ARE CRACKS BETWEEN TALIBAN AND ORDINARY AFGHANS. IF PROOF IS NEEDED, THEN LOOK CLOSELY AT THE UPRISING IN THE KHOST REGION IN FEB 2000. AN UPRISING THERE WAS NOTEWORTHY BECAUSE IT WAS THE HOME OF JALALUDIN ((HAQANI)), THE JADRAN TRIBAL LEADER MOST EXPLOITED BY ISI DURING THE SOVIET-AFGHAN WAR TO FACILITATE THE INTRODUCTION OF ARAB EXTREMISTS. THE TALIBAN BEGAN (b)(2)

DOCILE; EXTREMISM GREW AS THEIR CONFIDENCE GREW.

A. (C//[redacted] IF THE PUSHTO TRIBES AROUND KHOST WERE PROVOKED TO UPRISING THEY MUST HAVE BEEN VERY UPSET. IT IS RUMORED THAT JALAUDIN ((HAQNI)) WAS INCREASINGLY UNHAPPY WITH TALIBAN. IT IS POSSIBLE THAT AL QAEDA BEGAN TO TREAT THAT PART OF PAKTIA AS THEIR OWN. AL QAEDA APPARENTLY HAVE CAMPS NEXT TO PEWIR KOTAL (CNA), WHICH IS MANGAL LAND, AND ANOTHER IN TUNI [redacted] A FORMER AFGHAN ARMY BASE IN JADRAN LAND. IT IS ALSO LIKELY THAT TALIBAN WAS IMPOSING ALIEN ATTITUDES INSENSITIVE TO LOCAL FEELINGS. WHATEVER THE CAUSE, UPRISINGS TOOK PLACE, AND THIS IS A SURE INDICATION OF CRACKS BETWEEN TALIBAN AND ORDINARY AFGHANS. (b)(2)

B. (C/[redacted] THERE WAS ALSO AN UPRISING IN NIMRUZ PROVINCE IN SOUTH-EASTERN AFGHANISTAN AND ANOTHER WAS REPORTED TO HAVE BEEN NARROWLY AVERTED IN JALALBAD [redacted] THE PRIME STOMPING GROUND OF ABDUL ((HAQ)). HAQ'S BROTHER, ABDUL ((KADIR)), CONTINUES TO RESIST THE TALIBAN IN KUNAR [redacted] IN AFGHAN TERMS JUST UP THE ROAD. (b)(2)

8. (C/[redacted] INFLUENCING A STABLE AFGHANISTAN. A STRATEGY OF ORDER, INVOLVING GENEROUS HUMANITARIAN AID, SHOULD BE ADOPTED IN AREAS OUTSIDE TALIBAN CONTROL WITH AN AIM AT INFLUENCING A MORE STABLE FUTURE FOR AFGHANISTAN. IT WOULD HELP REINFORCE TO THE WIDER AFGHAN AUDIENCE THAT THE AFGHAN PEOPLE ARE NOT THE ENEMY. WHEN THEY REALIZE THEY ARE NOT THE ENEMY THEY WILL BEGIN TO WONDER WHO IS. FOR MOST AFGHANIS THAT WILL BE AN EASY ANSWER TO FIND, HAVING TOLERATED UNGRATEFUL FOREIGN GUESTS - AL QAEDA AND TALIBAN.

[redacted] (b)(1)

A. ~~(C/~~[redacted] IF THERE IS ONE THING AN AFGHAN CAN NOT BEAR ANOTHER AFGHAN TELLING HIM WHAT TO DO. EVEN WORSE IS A FOREIGNER ATTEMPTING TO TELL HIM WHAT TO DO. IN ATTITUDE, THE FUNDAMENTALIST ARAB AL QAEDA MEMBER WILL TREAT HIS AFGHAN HOST IN DIFFERING WAYS. SOMETIMES AUTHORITY WITH DEMURE RESPECT (AT LEAST ABOVE THE WATER LINE), OR A PATRONIZING PATERNALISM BASED ON HIS SELF ASSURED CONVICTION THAT HE IS THE BETTER MAN, (NOT LEAST BECAUSE THE AVERAGE AFGHANI CANNOT READ OR WRITE IN THEIR OWN LANGUAGE LET ALONE IN THAT OF THE ARABIC OF THE KORAN). (b)(2)

B. ~~(C/~~[redacted] THE AVERAGE AFGHAN PEASANT RESPONSE TO SUPERIORITY EXHIBITED BY AL QAEDA OVER THEIR HOSTS WILL BE LAYERED. FIRST, TOLERANCE BASED ON THE AFGHAN TRADITION OF MELMASTIA, HOSPITALITY. SECOND, RESPECT FOR THEIR SUPERIOR EDUCATION (TO SPEAK ARABIC IS REGARDED AS SCHOLARLY). THIRD, IF IMPOSED UPON TOO MUCH, A SLOW BUT GROWING RESENTMENT AT THE FOREIGNER LORDING IT OVER HIM.

9. ~~(C/~~[redacted] EVENTUALLY TALIBAN AND AL QAEDA WILL WAR WITH EACH OTHER. THE FEAR MUST BE THAT AL QAEDA WILL HAVE BECOME FULLY FORMED, IN SIZE, STRENGTH AND CAPABILITIES WHICH WILL ENABLE THEM TO CONSUME THEIR HOST (ALTHOUGH THEY MIGHT CONTINUE TO USE THE HANDY TALIBAN CLOAK WOVEN BY PAKISTAN TO SHROUD THEIR PROGRESS). (b)(2)

10. ~~(C/~~[redacted] POTENTIAL ALLIED RESPONSES. THE TERRAIN, THE CLIMATE, THE PEOPLE, AND THE PROBLEM STRONGLY ARGUE IN FAVOR OF A MORE COST EFFECTIVE MILITARY ENGAGEMENT THAN THE MASS DEPLOYMENT OF GROUND FORCES. THE ENEMY DOES NOT HAVE MASS, WHICH MAKES THEM HARDER TO ENGAGE. (b)(2)

A. ~~(C/~~ [redacted] HOWEVER, AL QAEDA IS NOT INDIGENOUS TO THE REGION AND IT LACKS THE ESSENTIAL POPULAR SUPPORT OF THE LOCAL POPULATION REACQUIRED FOR ANY HOPE OF WINNING AN EXTENDED WAR. THE DANGER, EVEN THE TRAP, RESIDES IN THE NATURE OF THE ENEMY. (b)(2)
AS A NON INDIGENOUS FORCE AL QAEDA MAY LEAVE A HARD-CORE DEDICATED CADRE TO FIGHT, WHILE THE MORE IMPORTANT PARTS SIMPLY RELOCATE TO ANOTHER COUNTRY (POSSIBLY CHECHNYA). THE ISLAMIC FUNDAMENTALIST MOVEMENTS WOULD ALSO GAIN MORE PROPAGANDA VALUE OUT OF ANY ALLIED MASS DEPLOYMENT. IF THE GROUND DEPLOYMENT INVOLVES MASS AND DURATION, THERE IS A STRONG PROBABILITY THAT THE GROUND TROOPS WILL BECOME THE TARGETS OF ANOTHER CONFLICT, EVEN AFTER AL QAEDA ARE ERADICATED.

B. ~~(C/~~ [redacted] RULING OUT MASS GROUND DEPLOYMENT, THE ONLY SERIOUS OPTIONS MUST BE A STAND-OFF AIR REPRISAL. THIS OFFERS SOME IMMEDIATE MATERIAL AND PROPAGANDA GAIN, BUT ONLY IF THE RIGHT TARGETS ARE STRUCK WITH THE RIGHT RESULT. TARGETS LOCATED IN OR CLOSE TO CITIES SHOULD BE IGNORED REGARDLESS OF THE DESIRABILITY THAT THEY MIGHT OFFER. THE ODDS ARE WHAT IS THOUGHT TO BE IN THEM HAS ALREADY BEEN MOVED. ADDITIONALLY, COLLATERAL DAMAGE TO ALL NEIGHBORING AREAS ALREADY SUSTAINED IN THE WAR WILL BE BLAMED ON THE AIR STRIKES. AIR STRIKES WILL ALSO INVOLVE AN INEVITABLE PROPORTION OF CIVILIAN CASUALTIES, PROBABLY DISPROPORTIONAL TO THE SIZE OF THE TARGET. STRIKES AT THESE LOCATIONS WELD A BOND BETWEEN AL QAEDA, TALIBAN, AND THE WIDER AFGHANI POPULATION, AS THEY DO NOT EFFECTIVELY DISTINGUISH BETWEEN THEM. A VITAL COMPONENT OF ANY STRIKE ACTION SHOULD BE DIRECTED AT EMPHASIZING THEIR DIFFERENCES NOT MINIMIZING THEM. (b)(2)

C. ~~(C/~~ [redacted] IDEAL AIR TARGETS ARE THOSE WELL AWAY FROM ANY LARGE CITIES, SUCH AS KABUL, KANDAHAR, JALALABAD, HERAT, MAZIR-I-SHARIEF. MASSIVE, NEAR TOTAL DESTRUCTION CAUSED BY PREVIOUS CONFLICTS WOULD BE EFFECTIVELY BLAMED ON ALLIED ACTION. INSTEAD THEY SHOULD BE THOSE TARGETS AS CLOSE TO THE FRONT LINE WITH OPPOSITION FORCES AS POSSIBLE. IDEALLY LIMITED TO 055 AND ANY OTHER AL QAEDA RESOURCES. (b)(2)

D. ~~(C/~~ [redacted] AIR REPRISAL WITH LIMITED SF GROUND DEPLOYMENT IS THE BEST OPTION. GROUND DEPLOYMENT ENABLES AN IMMEDIATE AND SERIOUS APPRECIATION OF THE TERRAIN, WILL REINFORCE THE ERROR OF MASS GROUND DEPLOYMENT, AND IMPROVE THE ACCURACY OF THE AIR STRIKE TARGETING. AS A FIRST STEP, THE ONLY SERIOUSLY TENABLE OPTION IS DEPLOYMENT WITHIN OPPOSITION HELD TERRAIN. ONCE LOCAL RESISTANCE IS ESTABLISHED, THE ENGAGEMENT CAN HAVE WIDER FOCUS THAN AL QAEDA. (b)(2)
SUBJ: IIR [redacted]
THESE STEPS WOULD INCREASE THE EFFECTIVENESS OF A SF LED OPERATIONS AND RECEIVE LOCAL SUPPORT.

E. ~~(C/~~ [redacted] STAND ALONE SF GROUND DEPLOYMENT. SINGLE RAID OPTIONS MIGHT BE ATTRACTIVE FOR SPEEDY RESULTS TO SATISFY DOMESTIC DEMANDS. BUT, WITHOUT A LOT MORE LOCAL KNOWLEDGE, THEY RUN SERIOUS RISKS DISPROPORTIONAL TO THE SHORT TERM GAINS. SF DEPLOYMENT WOULD ALSO, BY VIRTUE OF THE TERRAIN IDEALLY INVOLVE SIGNIFICANT AIR MOBILITY. WITHOUT AIR MOBILITY, RANGE AND CAPABILITY ARE SERIOUSLY DIMINISHED WHILE RISK IS SERIOUSLY INCREASED. (b)(2)

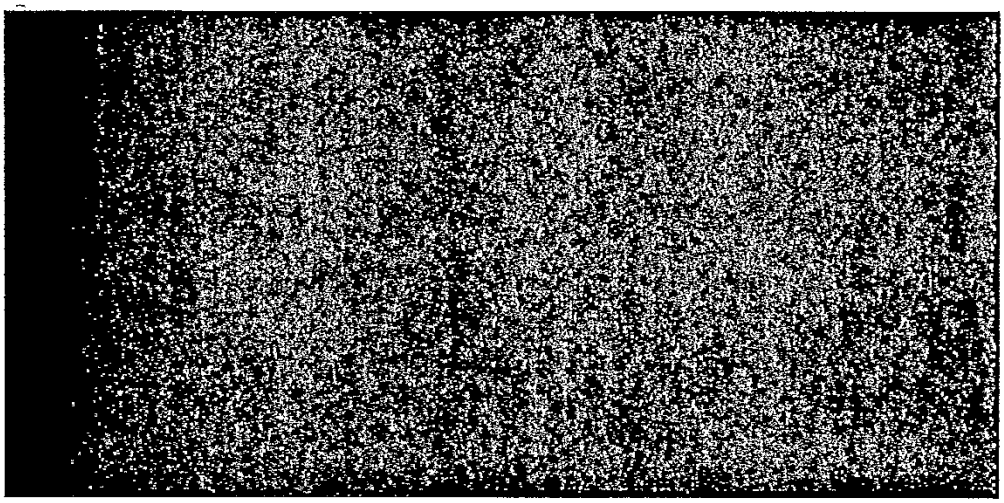
11. ~~(C/~~ [redacted] TALIBAN AND AIR RESPONSE. TALIBAN GROUND FORCES (DISCOUNTING 055 BRIGADE WITH AL QAEDA) LEFT TO THEIR OWN DEVICES ARE NEITHER VERY GOOD NOR VERY COMMITTED. GIVEN THE SMALL SCALE OF TALIBAN AIR CAPABILITY, ALLIED AIR POWER COULD BE USED TO REMOVE (b)(2)

THE TALIBAN AIR MOBILITY AND STRIKE CAPABILITY. HOWEVER, UNLESS THAT ARM POSES A SERIOUS DIRECT THREAT TO ANY ALLIED SF DEPLOYMENT IT SHOULD NOT FORM PART OF THE FIRST LIST OF AIR STRIKE TARGETS. TALIBAN AIRCRAFT ON THE GROUND SHOULD BE LEFT INTACT WHILE AN EFFECTIVE NO-FLY ZONE IS DECLARED AND ENFORCED. THIS WOULD SERVE TO REINFORCE TO THE LOCAL TALIBAN THE PERCEPTION THAT AL QAEDA IS THE TARGET AND NOT THE TALIBAN. SIMULTANEOUSLY, THIS ACTION PROVIDES HOPE THAT IF THE TALIBAN ADOPT A NON-INTERFERENCE POLICY OVER STRIKES TARGETING AL QAEDA, THEY MIGHT BE LEFT UNMOLESTED. TARGETING AL QAEDA WOULD ISOLATE THEM AND EMPHASIS THE DISTINCTION MADE BY WESTERN MILITARIES OVER AFGHAN AND NON-AFGHAN FORCES INSIDE THE COUNTRY. THAT DISTINCTION IS NOT ONE THAT WOULD BE LOST ON THE AFGHANS. ALLOWING TALIBAN A HOPE OF ULTIMATE SURVIVAL MIGHT ALSO REDUCE THEIR SUPPORT, IF NOT THEIR RHETORIC, FOR AL QAEDA. (b)(2)

12. ~~(S//~~ [redacted] THE ONLY EFFECTIVE DEFENSE TALIBAN CAN OFFER TO AIR STRIKE LIES IN WHAT STINGER MISSILES THEY MAY STILL HAVE STOCKPILED. IT SHOULD BE ASSUMED THAT AT LEAST SOME STINGERS ARE IN AL QAEDA HANDS CLOSE TO OSAMA BIN LADEN. THE REST WILL LARGELY BE STOCKPILED NEAR MAJOR CITIES AND AIRPORTS. ANOTHER REASON FOR LEAVING SUCH SITES WELL ALONE, AT LEAST IN THE SHORT TERM. (b)(2)

13. ~~(S//~~ [redacted] AL QAEDA AND AIR RESPONSE. ANY FAILURE OF SUPPORT FROM TALIBAN WILL INCREASE AL QAEDA PARANOIA AND MAY EVENTUALLY RESULT IN THE TALIBAN PREMATURELY TURNING ON THEIR HOSTS. THE TALIBAN WOULD INDIRECTLY AND UNWITTINGLY BE FORCED TO BECOME PART OF THE ALLIED EFFORT IN ERADICATING AL QAEDA OR AT LEAST MAKING ITS CONTINUED PRESENCE IN AFGHANISTAN UNTENABLE. (b)(2)

14. ~~(S//~~ [redacted] LONG TERM. TO ENSURE THE LONG TERM EXTINCTION OF AL QAEDA IN AFGHANISTAN, THE TALIBAN MUST, AS A SECONDARY MEASURE, BE SUCCESSFULLY MODERATED OR REMOVED FROM OFFICE. SHOULD THE TALIBAN BE FORCED TO DEFEND THEMSELVES AGAINST A DISAFFECTED AL QAEDA IT WOULD PRODUCE THE SPIN-OFF BENEFIT OF ALSO MATERIALLY WEAKENING THE TALIBAN. WHAT SHOULD FOLLOW IS THE ESTABLISHMENT OF A MORE STABLE COALITION AFGHAN GOVERNMENT FREE OF THE TALIBAN AND PAKISTANI INTERFERENCE.



(b)(1) (b)(2)

**October 2, 2001**

**Letter**

**To: Defense industry**
**From Undersecretary of Defense, Pete Aldridge, Jr.**

THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

ACQUISITION, TECHNOLOGY AND LOGISTICS

OCT 2 2001

Dear Industry Partners:

In the wake of our nation's recent shift to a war footing, I would like to take this opportunity to express my gratitude for the tremendous contributions your companies make to our nation's security. If past conflicts are any guide, your products will prove just as indispensable to our success in the arduous task ahead as the superb young Americans who will operate and utilize them.

I would also like to stress, during this national emergency, the importance of the use of discretion in all the public statements, press releases, and communications made by your respective companies, and by your major suppliers. As we all know, even seemingly innocuous industrial information can reveal much about military activities and intentions to the trained intelligence collector. Statistical, production, contracting, and delivery information can convey a tremendous amount of information that hostile intelligence organizations might find relevant. Secretary of Defense Rumsfeld has recently stressed the importance of security in this new national environment. This is doubly important in light of the potentially domestic nature of the threat at hand.

Thank you again for your hard work and contributions, and for those of your respective work forces. Together we will prevail.

Sincerely,

E.C. "Pete" Aldridge, Jr.
Under Secretary of Defense (AT&L)

October 5, 2001

Department of Defense  Cable

Re: Change in Pakistan's stance since September 11 attacks

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(b)(2)

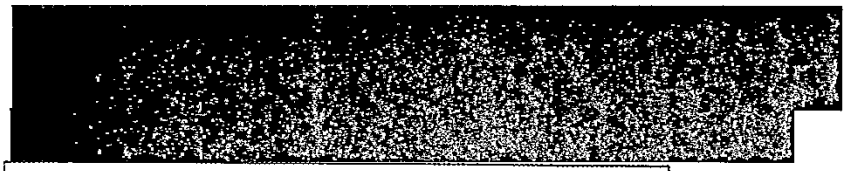
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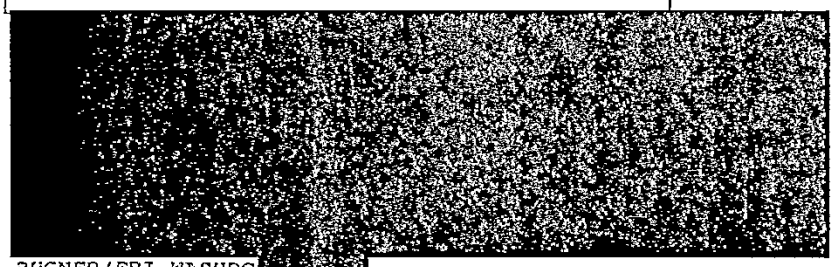
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RUEKJCS/JOINT STAFF WASHDC [redacted]
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RUCNFB/FBI WASHDC

BT

CONTROLS
~~C O N F I D E N T I A L~~ (b)(2)

~~CONFIDENTIAL~~
CITF: (U) DOD COUNTERINTELLIGENCE COLLECTION EMPHASIS
15-2001, DTG 180816Z SEP 01.
SERIAL: (U) IIR (b)(2)

TEXT
COUNTRY: (U) INDONESIA (ID)); INDIA (IN); AFGHANISTAN
(AF); IRAN (IR); PAKISTAN (PK).
IPSP: (U) (b)(2)

COMBINE: COMPLETE

(b)(2)

WARNING: (U) THIS IS AN INFORMATION REPORT, NOT FINALLY
EVALUATED INTELLIGENCE. REPORT CLASSIFIED ~~C O N F I D E N T I A L~~

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DEPARTMENT OF DEFENSE

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DOI: (U) 20011003.

(b)(2)

SOURCE: (U) (b)(2)

SUMMARY: ~~(C)~~ (b)(1)

(b)(1) [redacted] MAINTAINS THE VAST MAJORITY OF PAKISTANIS ARE FIRMLY IN SUPPORT OF PRESIDENT MUSHARAFF; SAYS TNI SOUGHT A MEETING WITH UBL AND TALIBAN REPS TO ASK THEM TO STOP SUPPORT FOR DOMESTIC INDONESIAN MUSLIM GROUPS; CLAIMS GOP CLOSED DOWN THE AL RASHID COMPUTER SCHOOL AND HARKAT UL MUJAHADIN OFFICE IN LAHORE BECAUSE OF THEIR TIES TO THE TALIBAN; MAINTAINS AL QAEDA IS PRODUCING RUDIMENTARY CHEM/BIO AGENTS IN AFGHANISTAN. MUSLIM GROUPS DEMONSTRATE IN FRONT OF THE PAKISTAN EMBASSY.

TEXT: 1. ~~(C)~~ [redacted] (b)(1)

2. ~~(C)~~ [redacted] MAINTAINED THAT PRESIDENT MUSHARAFF IS FULLY COMMITTED TO SUPPORT THE INTERNATION FIGHT AGAINST TERRORISM AND CONFIDENT THAT IT IS THE RIGHT COURSE OF ACTION THAT SERVES PAKISTAN'S SELF INTERESTS. IT HAS NOTHING TO DO WITH SUPPORT FOR THE U.S. PER SE, BUT OF COURSE PAKISTAN WOULD LIKE TO BE RECOGNIZED AND ASSISTED BY THE U.S. AND REST OF THE INTERNATIONAL COMMUNITY FOR ITS COMMITMENT IN THE STRUGGLE. HE SAID MUSHARAFF AND OTHER PAKISTANI LEADERS SEE THIS AS AN OPPORTUNITY FOR A BETTER FUTURE AND EXPECT CONCRETE FORMS OF ASSISTANCE TO HELP PAKISTAN CLIMB OUT OF THE TERRIBLE ECONOMIC CONDITION THE COUNTRY PRESENTLY IS IN. (b)(1)

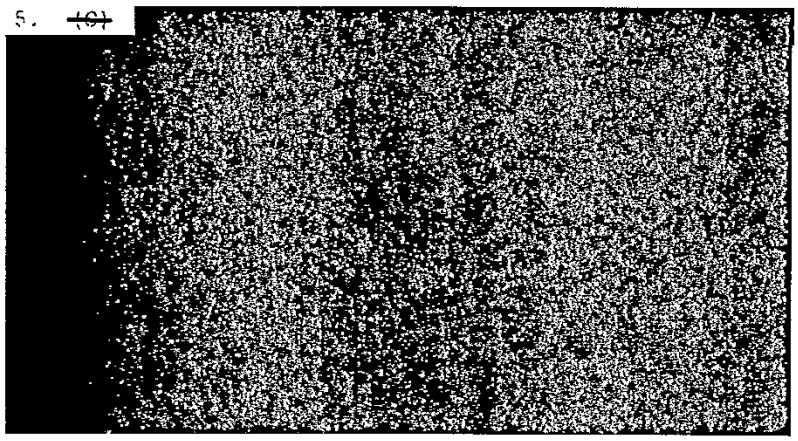
3. ~~(C)~~ [redacted] SAID THE VAST MAJORITY OF PAKISTANIS ARE FIRMLY IN SUPPORT OF THE PRESIDENT. HE MAINTAINED THERE IS NO DIVISION WITHIN THE MILITARY AND NO HESITATION TO SUPPORT THE PRESIDENT AMONG PAKISTAN'S MILITARY LEADERS. ALL OF THE CORPS, DIVISION AND OTHER SENIOR MILITARY COMMANDERS HAVE ALREADY PLEDGED THEIR LOYALTY TO MUSHARAFF. ALMOST ALL OF PAKISTAN'S TRADITIONAL TRIBAL LEADERS HAVE ALSO PLEDGED SUPPORT. ONLY A FEW FRINGE ISLAMIC POLITICAL FIGURES ARE PROTESTING, BUT ACCORDING TO [redacted] THESE POLITICIANS ARE CORRUPT AND DISCREDITED, WHILE MOST OF THEIR SUPPORTERS ARE IGNORANT, BEARDED VILLAGERS. (b)(1)

4. ~~(C)~~ [redacted] (b)(1)



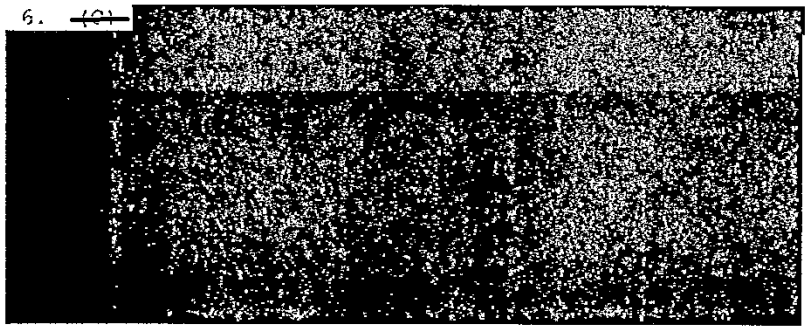
(b)(1)

5. ~~(C)~~



(b)(1)

6. ~~(C)~~



(b)(1)

7. ~~(C)~~ [redacted] SAID THE SITUATION IN PAKISTAN REMAINS CALM. THERE IS NO SYMPATHY FOR THE TALIBAN AMONG THE ROUGHLY 2 MILLION AFGHAN REFUGEES INSIDE PAKISTAN. MANY OF THE REFUGEES FLED THE TYRANNY OF THE TALIBAN AND MOST ARE FED UP WITH THE TALIBAN LEADERSHIP. NEITHER ARE THEY SYMPATHETIC WITH UBL AND HIS FOLLOWERS.



(b)(1)

8. ~~(C)~~ [redacted] SAID MOST OF THE AFGHANS IN PAKISTAN ARE COMPLETELY DESTITUTE AND FORCED TO ACCEPT ANY TYPE OF MENIAL LABOR OR BEG TO SURVIVE. HE SAID THE INTERNATIONAL COMMUNITY SHOULD WORK WITH PAKISTAN TO PROVIDE HUMANITARIAN SUPPORT TO THESE PEOPLE - "TO WIN THE HEARTS AND MINDS" OF THE AFGHANS BY TELLING THEM, "WE ARE NOT AGAINST THE AFGHAN PEOPLE AND WANT TO HELP

(b)(1)

YOU."

9. ~~(C)~~ [redacted] SAID IT WOULD BE A MISTAKE FOR THE U.S. TO BACK THE NORTHERN ALLIANCE IN AFGHANISTAN. HE MAINTAINED THAT THE NORTHERN ALLIANCE IS OF LITTLE IMPORTANCE. IT HAS PRIMARY ALLIEGENCE TO IRAN AND PAKISTAN TRADITIONALLY HAS NEVER HAD CLOSE TIES TO THIS GROUP. [redacted] (b)(1)

10. ~~(C)~~ [redacted] SAID PRESIDENT MUSHARAFF ORDERED THE CLOSING OF THE AL RASHID COMPUTER SCHOOL IN LAHORE BECAUSE OF ITS CONNECTIONS TO THE TALIBAN. HE SAID THE PRESIDENT ALSO ORDERED AUTHORITIES TO SHUT DOWN THE HARKAT UL MUJAHADIN OFFICE IN LAHORE. HE SAID HARKAT UL MUJAHADIN IS A KASHMIRI GROUP WITH CONNECTIONS TO TALIBAN THAT HAD BEEN COLLECTING MONEY IN LAHORE. ACCORDING TO [redacted] BOTH ORGANIZATIONS WERE CLOSED ON 2 OCT. HE SAID THE CLOSING OF THE HARKAT UL MUJAHADIN OFFICE WAS CONTROVERSIAL BECAUSE SOME PAKISTANIS WERE ACCUSING MUSHARAFF OF BOWING TO U.S. PRESSURE TO CUT OFF SUPPORT FOR KASHMIRI FREEDOM FIGHTERS. BUT, [redacted] SAID THE HARKAT UL MUJAHADIN WAS CLOSED PURELY BECAUSE OF ITS TIES TO THE TALIBAN. [redacted] CATEGORICALLY DENIED INDIAN ALLEGATIONS THAT KASHMIRI MUJAHADIN WERE TRAVELLING TO AFGHANISTAN TO SUPPORT THE TALIBAN. (b)(1)

11. ~~(C)~~ [redacted] SAID HE WAS SURE THAT UBL AND AL QAEDA HAVE MADE EFFORTS TO PRODUCE CHEMICAL AND BIOLOGICAL WARFARE AGENTS, BUT FELT THAT THESE PROGRAMS WERE VERY RUDIMENTARY. HE ASSUMED THAT THE GOP WAS SHARING ANY DETAILS ON THESE FACILITIES, ALONG WITH OTHER UBL ACTIVITIES IN AFGHANISTAN, WITH THE U.S. (b)(1)

12. ~~(C)~~ [redacted] SAID NEITHER INDIAN NOR PAKISTANI MILITARY FORCES WERE CONDUCTING DRY SEASON TRAINING MANUEVERS NEAR THE BORDER THIS YEAR. PAKISTAN'S ONLY CONCERN WITH INDIA IS THE SITUATION IN KASHMIR. IN THE AFTERMATH OF THE SERIOUS CAR BOMB INCIDENT IN INDIAN KASHMIR, [redacted] SAID PAKISTANI LEADERS ARE CONCERNED THAT THE U.S. WILL AGREE TO INDIA'S DEMANDS THAT KASHMIR BE TREATED AS A GLOBAL TERRORISM PROBLEM. HE MAINTAINED THAT INDIAN LEADERS ARE NOW FEELING POLITICALLY AND MILITARILY STRONG. THEY ARE LIKELY TO EXPLOIT THE SITUATION BY ACTIVELY LOBBYING THE INTERNATIONAL COMMUNITY OVER KASHMIR. [redacted] SAID PAKISTANI LEADERS ALSO EXPECT THAT INDIA MIGHT TAKE SOME MILITARY ACTION IN KASHMIR DURING THE CURRENT CRISIS. (b)(1)

**October 26, 2001**

**Department of Commerce Memo**

**RE: Government-wide Freedom of Information Act Request Policy**

UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
WASHINGTON, D.C. 20230

OCT 26 2001

MEMORANDUM FOR: Secretarial Officers
Heads of Operating Units

FROM: Barbara S. Fredericks
Assistant General Counsel
For Administration

SUBJECT: Government-wide Freedom of Information Act (FOIA) Policy

Last week, the Attorney General issued a memorandum reminding agencies that discretionary disclosures under FOIA should be made only after full and deliberate consideration of the institutional, commercial, and privacy interests that could be implicated by disclosure of the information. This is a change in policy from the foreseeable harm standard, which operated on the presumption of disclosure and required that exemptions be asserted only after a determination that there would be foreseeable harm to governmental or private interests. The new policy provides for withholding of information protected by FOIA exemptions, without requiring a foreseeable harm analysis.

When determining whether to make discretionary disclosures, an agency should consider such interests as national security, law enforcement effectiveness, business confidentiality, internal Government deliberations, and personal privacy. As always, information cannot be withheld under FOIA unless it is protected by a FOIA exemption. The written statement drafted by operating units prior to issuing an initial FOIA denial (formerly the foreseeable harm statement) must reflect why all withheld information falls within a FOIA exemption or exemptions.

If you have any questions about this issue, please contact me or Judith Means of my staff at (202) 482-0387. We are available to meet with members of your staff to discuss these changes.

cc: Department of Commerce FOIA officers

Attachment

# Office of the Attorney General
Washington, D. C. 20530

October 12, 2001

MEMORANDUM FOR HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

FROM: John Ashcroft
Attorney General

SUBJECT: The Freedom of Information Act

As you know, the Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). It is only through a well-informed citizenry that the leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed.

The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.

Our citizens have a strong interest as well in a government that is fully functional and efficient. Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them.

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters. When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

This memorandum supersedes the Department of Justice's FOIA Memorandum of October 4, 1993, and it likewise creates no substantive or procedural right enforceable at law.

U.S. Department of Justice

Office of Information and Privacy

*Telephone: (202) 514-3642*

*Washington, D.C. 20530*

October 15, 2001

MEMORANDUM

TO: Principal FOIA Administrative and Legal Contacts at All Federal Agencies

FROM: Richard L. Huff
Daniel J. Metcalfe
Co-Directors
Office of Information and Privacy

SUBJECT: New Attorney General Memorandum on the FOIA

Enclosed is a new policy memorandum on the Freedom of Information Act that was issued by Attorney General John Ashcroft this past Friday evening, October 12, 2001.

As you can see, Attorney General Ashcroft's FOIA Memorandum establishes a new "sound legal basis" standard governing the defense of Freedom of Information Act lawsuits by the Department of Justice. It also recognizes the continued agency practice of making discretionary disclosures of exempt information under the Act, subject to statutory prohibitions and careful agency consideration of all institutional, commercial, and personal interests involved.

This new statement of FOIA policy supersedes the FOIA policy statement that was issued by the Department of Justice in October 1993, and it is effective immediately. The presidential statement on the FOIA that was issued in 1993 remains in effect.

Please ensure that this new FOIA policy memorandum is distributed widely within your agency as expeditiously as possible. Additionally, we will be distributing and discussing it at a FOIA Officers Conference to be held on Thursday, October 18, at the Commerce Department's Main Auditorium, at 10:00 a.m. It also is being made available through *FOIA Post* on the Department of Justice's FOIA Web site as of today.

Do not hesitate to contact OIP, through its FOIA Counselor service, at (202) 514-3642, with any question about this FOIA policy memorandum or any other aspect of FOIA administration.

Enclosure

October 21, 2001

Department of Justice Memorandum

From: Attorney General John Ashcroft
To: Heads Of All Federal Departments and Agencies

Re: Freedom of Information Act Policy Guidance

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# Office of the Attorney General
Washington, D. C. 20530

October 12, 2001

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Our citizens have a strong interest as well in a government that is fully functional and efficient. Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them.

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In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters. When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

This memorandum supersedes the Department of Justice's FOIA Memorandum of October 4, 1993, and it likewise creates no substantive or procedural right enforceable at law.

October 18, 2001

Memorandum for Secretaries of the military Departments

Subject: Operations Security Throughout the Department of Defense

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

18 OCT 2001

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTOR OF THE DOD FIELD ACTIVITIES

SUBJECT: Operations Security Throughout the Department of Defense

On 14 September the President declared a national emergency by reason of terrorist attacks and the continuing and immediate threat of further attacks on the United States. As this Department assists wide-ranging efforts to defeat international terrorism, it is clear that US military and civilian service lives, DOD operational capabilities, facilities and resources, and the security of information critical to the national security will remain at risk for an indefinite period.

It is therefore vital that Defense Department employees, as well as persons in other organizations that support DOD, exercise *great* caution in discussing information related to DOD work, regardless of their duties. Do not conduct *any* work-related conversations in common areas, public places, while commuting, or over unsecured electronic circuits. Classified information may be discussed *only* in authorized spaces and with persons having a specific need to know and the proper security clearance. Unclassified information may likewise require protection because it can often be compiled to reveal sensitive conclusions. Much of the information we use to conduct DOD's operations must be withheld from public release because of its sensitivity. If in doubt, do not release or discuss official information except with other DoD personnel.

All major components in this Department to include the Office of the Secretary of Defense, the Military Departments, the Joint Staff, the Combatant Commands, the Defense Agencies, the DOD Field Activities and all other organizational entities within the DOD will review the Operations Security (OPSEC) Program, described in DOD Directive 5205.2, and ensure that their policies, procedures and personnel are in compliance. We must ensure that we deny our adversaries the information essential for them to plan, prepare or conduct further terrorist or related hostile operations against the United States and this Department.

Paul Wolfowitz

**October 18, 2001**

**Department of Health and Human Service E-mail**

**RE: Department of Justice Freedom of Information Act Briefing**

## Davis, Jeffrey (HHS/OS)

**From:** Azar, Alex (HHS/OS)
**Sent:** Thursday, October 18, 2001 2:00 PM
**To:** White, Timothy (HHS/OS); Wiley, Ladd (HHS/OS)
**Cc:** Cade, David (HHS/OS); Davis, Jeffrey (HHS/OS)
**Subject:** RE: FOIA

Yes please. Could we all get a briefing?

-----Original Message-----
**From:** White, Timothy (HHS/OS)
**Sent:** Thursday, October 18, 2001 1:42 PM
**To:** Azar, Alex (HHS/OS); Wiley, Ladd (HHS/OS)
**Cc:** Cade, David (HHS/OS); Davis, Jeffrey (HHS/OS)
**Subject:** FOIA

Jeff Davis attended a presentation by the Justice Department on the FOIA this morning. The short message is that Justice is withdrawing the so-called Reno memo (which pretty much mandated disclosure especially of pre-decisional records) and will defend agency denial decisions if there is any credible reason to do so. Jeff would be glad to brief you if you want more information.

**October 19, 2001**

**Department of Health and Human Service E-mail**

**RE: Department of Justice Freedom of Information Act Briefing**

## Cirrincione, Rosario (HHS/OS)

**From:**
**Sent:** Friday, October 19, 2001 4:01 PM
**To:** Comfort, Nancy (AHRQ); Posman, Harry (AOA); Armstrong, Lynn (CDC); Jackson, Lee J (HCFA); Dorsey, Betty B (FDA); Merrill, Steven (HRSA); Cornell, Susan (OD); Christian, Darlene (PSC); Kretschmaier, Roselyn (PSC); El-Hinnawy, Pat (OD)
**Cc:** Davis, Jeffrey (HHS/OS); Eckert, Robert (HHS/OS); Blackwell, Maggie (HHS/OS); Wharton, Frances (HHS/OS); Rogers, Jo-Alice (HHS/OS)
**Subject:** Attorney General's Memorandum on the Freedom of Information Act

On October 12, 2001, Attorney General John Ashcroft signed a memorandum to the Heads of All Federal Departments and Agencies. A copy of the memorandum and a transmittal from the Office of Information and Privacy, DOJ, are posted on the FOIA POST page of the DOJ website, www.usdoj.gov/oip/foiapost/mainpage.htm. The memorandum recognizes both the citizen's right to know and the Government's need to safeguard national security, enhance law enforcement effectiveness, protect sensitive business information, protect personal privacy, and protect the decision making process. Please note that agencies are especially encouraged to give careful thought to the impact of discretionary releases on the privileges that FOIA exemptions are designed to protect. The memorandum also establishes "a sound legal basis" and " an unwarranted risk of adverse impact on the ability of other agencies to protect other important records" as the standards which the Justice Department will use to determine whether to defend an agency's denial in litigation.

Both on the FOIA POST website and in a meeting held by OIP on October 18th, agencies are reminded that information regarding threat assessments, strategic materials stockpiling, and other information necessary for counter-terrorism activities which may not meet the deliberative process requirements of exemption (b)(5), may well be protected under the "high (b)(2)" exemption. Be sure to read the material referenced in the next to last paragraph of the OIP comments following the text of the Attorney General's memorandum.

A hard copy of this E-mail and of the Attorney General's memorandum will follow shortly.

Ross

**October 25, 2001**

**Memorandum From: Chris Smith, Kent Smetters**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: Social Security Reform**

MEMORANDUM FOR SECRETARY O'NEILL

From: Kent Smetters
Chris Smith

Date: October 25, 2001

Subject: Comments on CEA-NEC version of the POTUS briefing memo for the President's visit with the Social Security Commission Chairmen on October 30.

Background

The President is scheduled to meet with the co-chairs of the Social Security Commission, Senator Moynihan and Richard Parsons, on October 30th, 2001. The Commission is slated to begin public deliberations on the outlines of a plan on November 9th.

Status of Commission Deliberations

The fiscal subgroup of the Commission is currently in a state of flux, but they have reached a tentative agreement to recommend reducingfuture benefit growth by moving to price indexing. **Commission members are unclear about two issues: (1) what the President meant during his campaign by the word "voluntary," and, (2) whether the President wants a list of reform options in the final report or a specific plan.**

Regarding "voluntary," it is clear that some players in the White House had believed (and some still do) that "voluntary" means that people could, if they chose, stay in the current Social Security with no increase in payroll taxes and no cuts in benefits. One problem with that approach is that it would leave Social Security on an unsustainable course. The other competing understanding of "voluntary" – and the interpretation desired by most Commission members – involves a two-steps approach originally proposed by Glenn Hubbard. The first step would involve a benefit cut for *everyone* -- i.e., regardless of participation in personal accounts -- in order to put Social Security on a sustainable on its own. The second step – and where voluntary becomes relevant – would give people the choice to receive an *additional* benefit reduction in exchange for allowing them to divert some of their payroll taxes to personal accounts.

Regarding coming up with a list of reform options versus a specific plan, Commission members have been operating under the assumption that they will come up with a specific plan. In the past, there was significant resistance by Commission members to produce a report that outlines the "general reasons and principles" for creating personal accounts or to produce a list of options. However, now the White House seems to want the take the latter options approach in order to leave some wiggle room for the future.

CEA-NEC Memo for the President

The attached CEA-NEC memo is an attempt by Glenn Hubbard to engage the President on important *related* matters. Glenn has been working hard in trying to get input from the

principals. Although the CEA has its own thoughts about personal accounts, they are not wedded to a particular plan and they seem to be genuinely interested in getting Treasury's input.

Larry Lindsey is clearly wedded to his own particular plan – a plan that faces stiff resistance from many people outside of the NEC, including those in the CEA and Treasury. In the past, Larry has written some memos outlining his plan. But it is our understanding that, so far, these memos have not been sent to the President because of CEA objections. The current CEA-NEC memo reflects, in part, another attempt by Larry to present his plan to the President. Its inclusion, however, does not represent an endorsement by the CEA by any means.

Problems with the CEA-NEC Memo

The first part of the CEA-NEC memo (up until, but *not* including, "A Comparison of Different Approaches to Creating Personal Accounts") summarizes some of the key bigger picture decisions that the CEA and NEC feels that the President must make before meeting with the Commission chairs next week. However, the rest of the memo appears to put the President in a position where he is to make a choice between several competing plans – none of which include Treasury's approach. The memo then concludes with an analysis of Larry's specific plan.

The CEA's intention of presenting specific numbers for specific plans is simply to give the President an appreciation for the tradeoffs that are necessary under different approaches. **However, the document provides many more details than are necessary or appropriate for the President to make some key decisions right now.** The Larry plan at the end of the document is an attempt by NEC to present the President with Larry's ideas. Clearly, the person who actually gives the President the verbal background briefing will play an important role in affecting the President's decision-making process.

Right now, the document is currently in the middle of "no man's land." It contains much more information than is necessary to get the President focused on the few big questions that he must answer right now. At the same time, if the intention is to orient the President toward a particular approach (which is NEC's intention), the memo does not include a description of other approaches, including Treasury's.

Although the issues dealt under the "Key Decisions" section are important and related to the Commission's tasks, the memo could be even more direct in engaging the President with the precise concerns facing the Commission. For example, what is the meaning of the "voluntary" to the President? Does the President want the Commission to create a single plan or a list of plans? Or, does the President simply want the Commission to spell out some general principles without coming up with any specific plan?

We recommend that you request the following changes in the approach to the presentation to the President:

**Engage the President primarily and directly on 3 questions: 1) Is he willing to live with benefit cuts (i.e., "pain") like that called for by price indexing benefits? 2) What is the meaning of "voluntary" (does he want to inflict pain on everyone, or just those who**

**voluntarily opt out of the current system?) 3) Does he want to force the Commission to come up with one plan or allow multiple plans? (We can communicate directly with CEA some specific ideas that we have for sharpening the document in this regard.) The analysis of the Larry plan (from "An Example of a Mixed Approach" onward) should be dropped.**

EXECUTIVE OFFICE OF THE PRESIDENT

COUNCIL OF ECONOMIC ADVISERS



Date: 10/25/01

Please deliver to: Jim Adams

FAX number of addressee: 622-0073

Telephone number of addressee: 622-1986

From: Glenn Hubbard
COUNCIL OF ECONOMIC ADVISERS

FAX number of sender: (202) 395-6958

Telephone number of sender: (202) 395-5042

Number of pages, including cover sheet: 17

Message: Jim, While there are still some rough spots, I would like to talk to Secretary O'Neill and explain this to him.

Glenn

OCT-25-2001 07:29 EOP-CEA 202 395 6958 P.01

# Personal Accounts and Social Security Reform

Personal accounts are a bold, dramatic reform that changes the focus of Social Security to wealth accumulation. Accounts have *many* advantages over the existing system, including:

- Ownership
- Investment choice
- Ability to leave money to one's children
- Benefits insulated from political risk (changes to benefits and taxes)
- Opportunity to pursue higher returns

Even with the higher returns from personal accounts, there are only two ways to make the program fiscally sustainable:

1. Increase revenues
   - General revenue
   - Voluntary contributions
   - We've ruled out a payroll tax hike
2. Decrease expenditures
   - Slow the rate of benefit growth in the future

# Key Decision Required: Sustainability?

1. To what extent do you wish to move toward fiscal sustainability?

   a. Leave fiscal problem for another day

      PROS: No change in benefits for any retiree

      CONS: Accounts will appear to worsen Social Security finances because general revenue is required to finance transition
      Delaying action makes future choices even more difficult

   b. Take action now to restore fiscal sustainability

      Requires a decision about how this is to be done

## Key Decision Required: Treatment of Workers Who Are Younger Than 55?

2. In the campaign, you made it clear that workers now retired and those near retirement would not have their benefits changed. Does the same apply to younger workers who do not opt for personal accounts?

   a. Do not change system for workers under 55 who do not take personal accounts

      PROS: No reduction in benefits

      CONS: Makes sustainability of the system more difficult
      Punishes workers who take the accounts relative to those who do not unless accounts subsidized with general revenue

   b. Require changes for all workers under 55 to make system sustainable

      PROS: Makes it easier to achieve financial sustainability
      Personal accounts can be made much more attractive

      CONS: Benefits are cut for those not taking the account

## Key Decision Required: How To Achieve Sustainability?

3. If you wish to move substantially toward fiscal sustainability, would you prefer to do it primarily by slowing benefit growth, or by committing new money to the system.

   a. Slowing the rate of traditional benefit growth (including those not taking the accounts)

      PROS: Places system on a permanently sustainable path
      System savings allows one to make accounts more attractive

      CONS: Benefits are being reduced relative to currently scheduled benefits

   b. Contribute new money to the system, either through general revenue or through voluntary contributions

      PROS: No changes to benefits
      Could be used to place system on sustainable path

      CONS: Commits nation to significant increase in general revenue, or requires that individuals contribute additional money
      Opponents will say that general revenue or new contributions could save system "as is"

# A Comparison of Different Approaches to Creating Personal Accounts

## 1. Personal Accounts Only (Leave System Unsustainable)

- Individuals may stay in traditional system without any change to benefits
- A voluntary personal account equal to 4% of wages, up to maximum annual contribution of $1000
- The account increases benefits for anyone earning more than a 4% real return

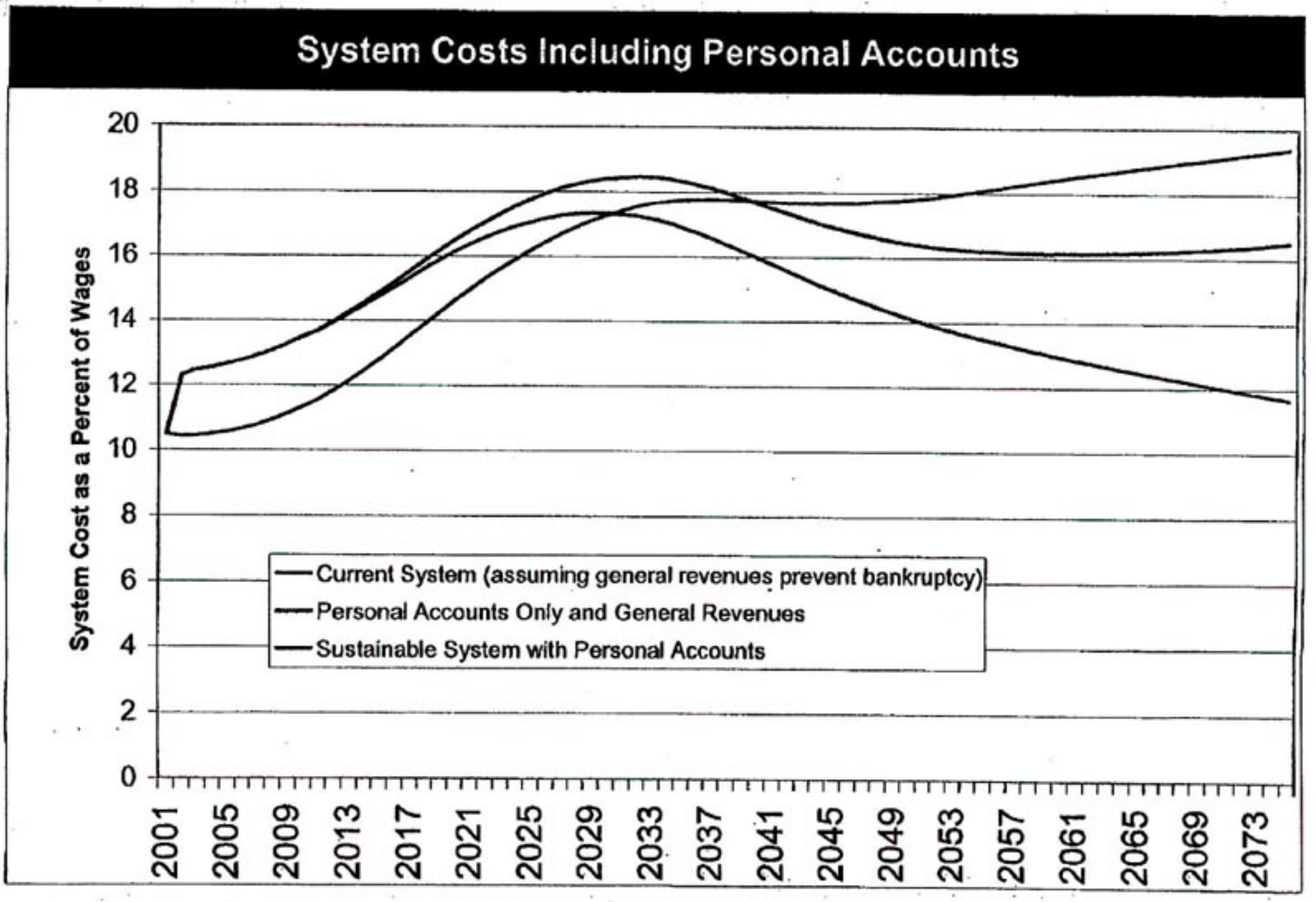
## 2. Sustainable System Through Benefit Adjustments

- Price index the system starting in 2009, but allow benefits for low income individuals to rise through 2028.
- A voluntary personal account equal to 4% of wages, up to maximum annual contribution of $1000
- The account increases benefits for anyone earning more than a 2% real return

## 3. Sustainable System Through New Revenue/Contributions

- New revenue (general revenue transfers or voluntary contributions) used to restore sustainability
- Individuals may stay in traditional system without any change to benefits
- A voluntary personal account equal to 4% of wages, up to maximum annual contribution of $1000
- The account increases benefits for anyone earning more than a 4% real return

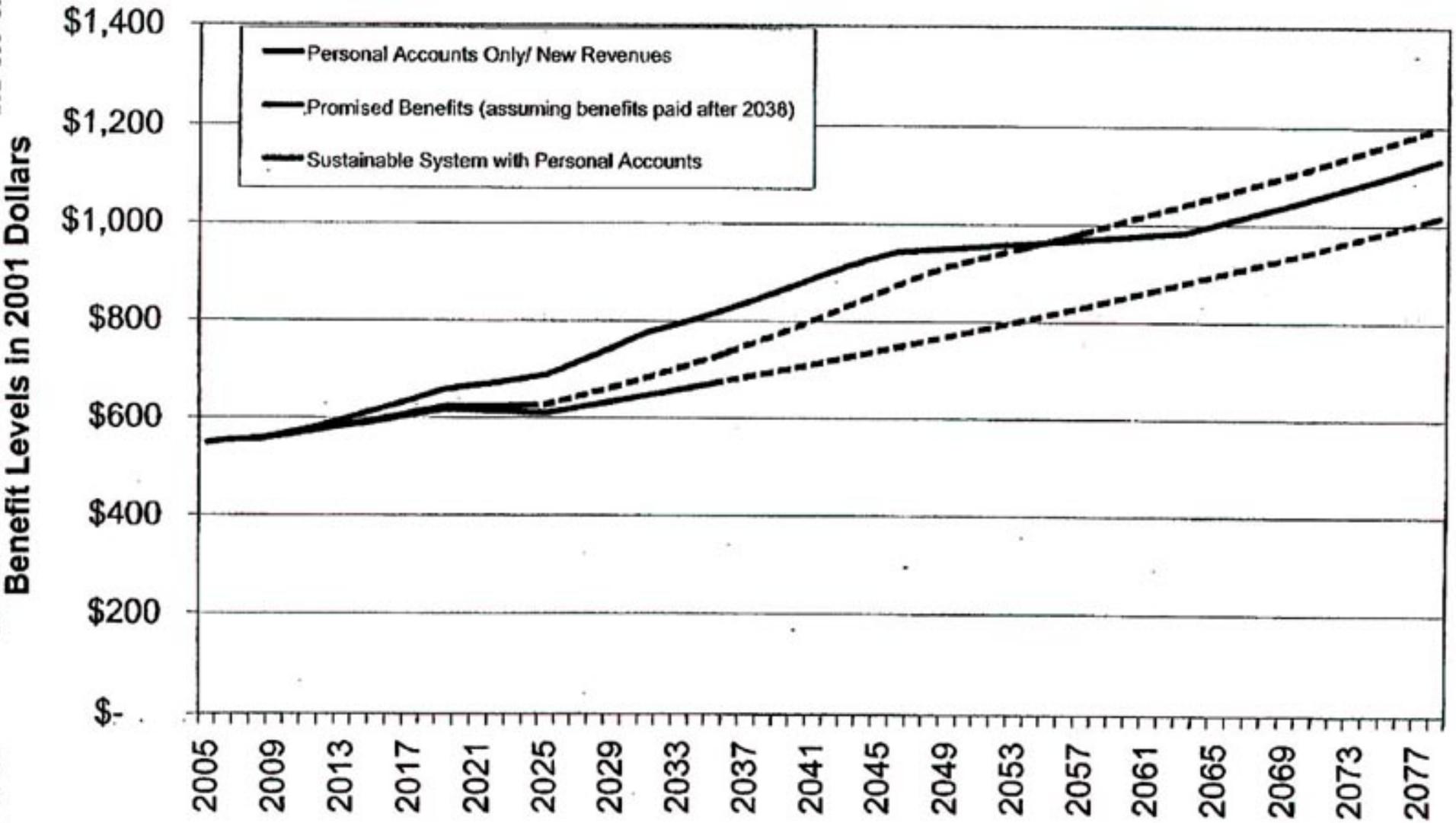
Note: Larger Accounts are Possible Under Any of these Three Approaches


System Costs Including Personal Accounts
System Cost as a Percent of Wages
20
18
16
14
12
10
8
6
4
2
0
2001
2005
2009
2013
2017
2021
2025
2029
2033
2037
2041
2045
2049
2053
2057
2061
2065
2069
2073
Current System (assuming general revenues prevent bankruptcy)
Personal Accounts Only and General Revenues
Sustainable System with Personal Accounts

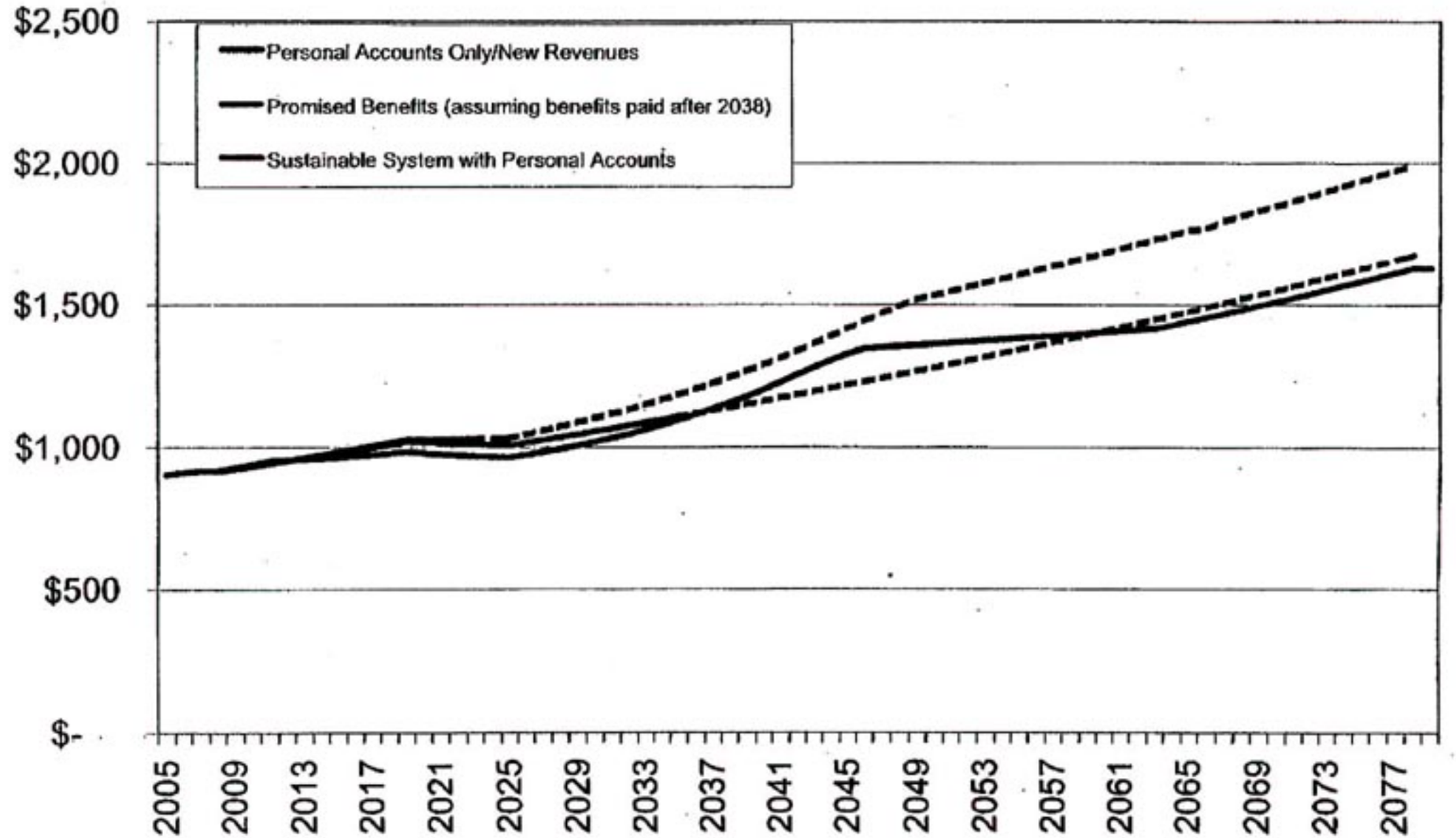
# System Finances Over 75 Years

| | Average Tax Rate |
|---|---|
| Current System (with General Revenues to Avoid Bankruptcy) | 15.44% |
| Sustainable System with Personal Accounts | 14.63% |
| Personal Accounts Only and General Revenues | 15.91% |

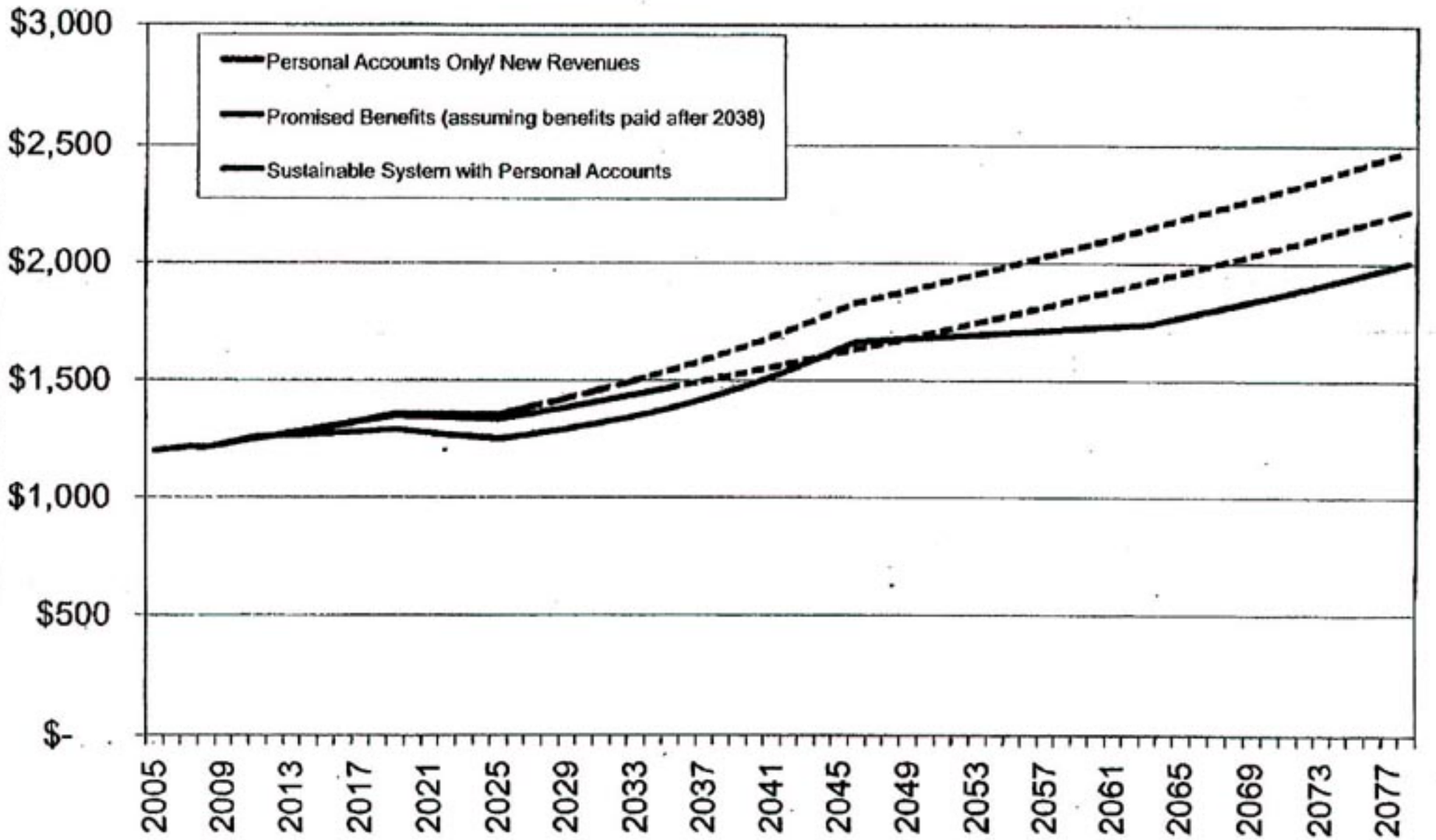
# Career Low Earner Benefit at Age 65 With a 5.15% Real Return



# Career Average Earner Benefit at Age 65 With a 5.15% Real Return



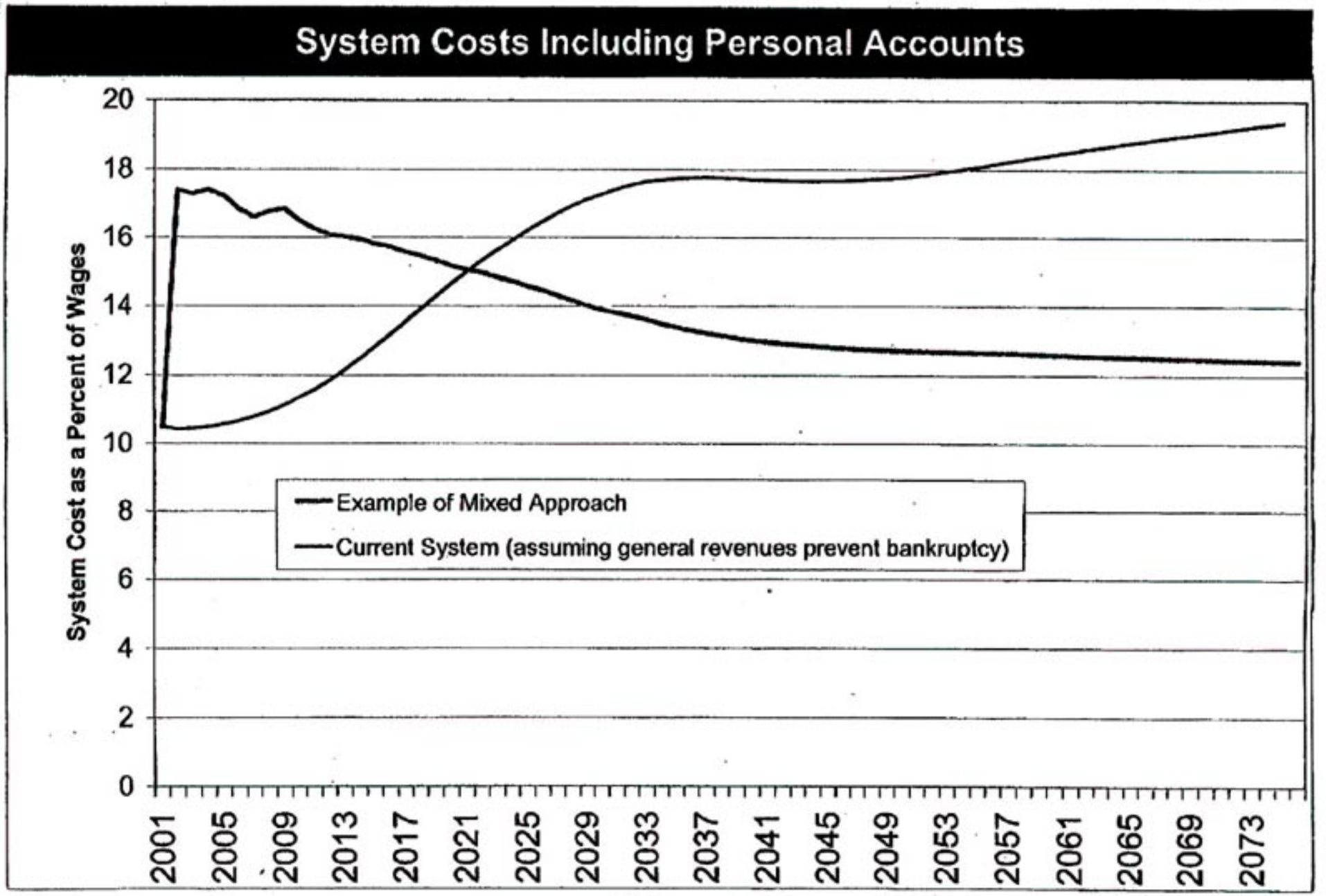
# Career High Earner Benefit at Age 65 With a 5.15% Real Return



# An Example of a Mixed Approach

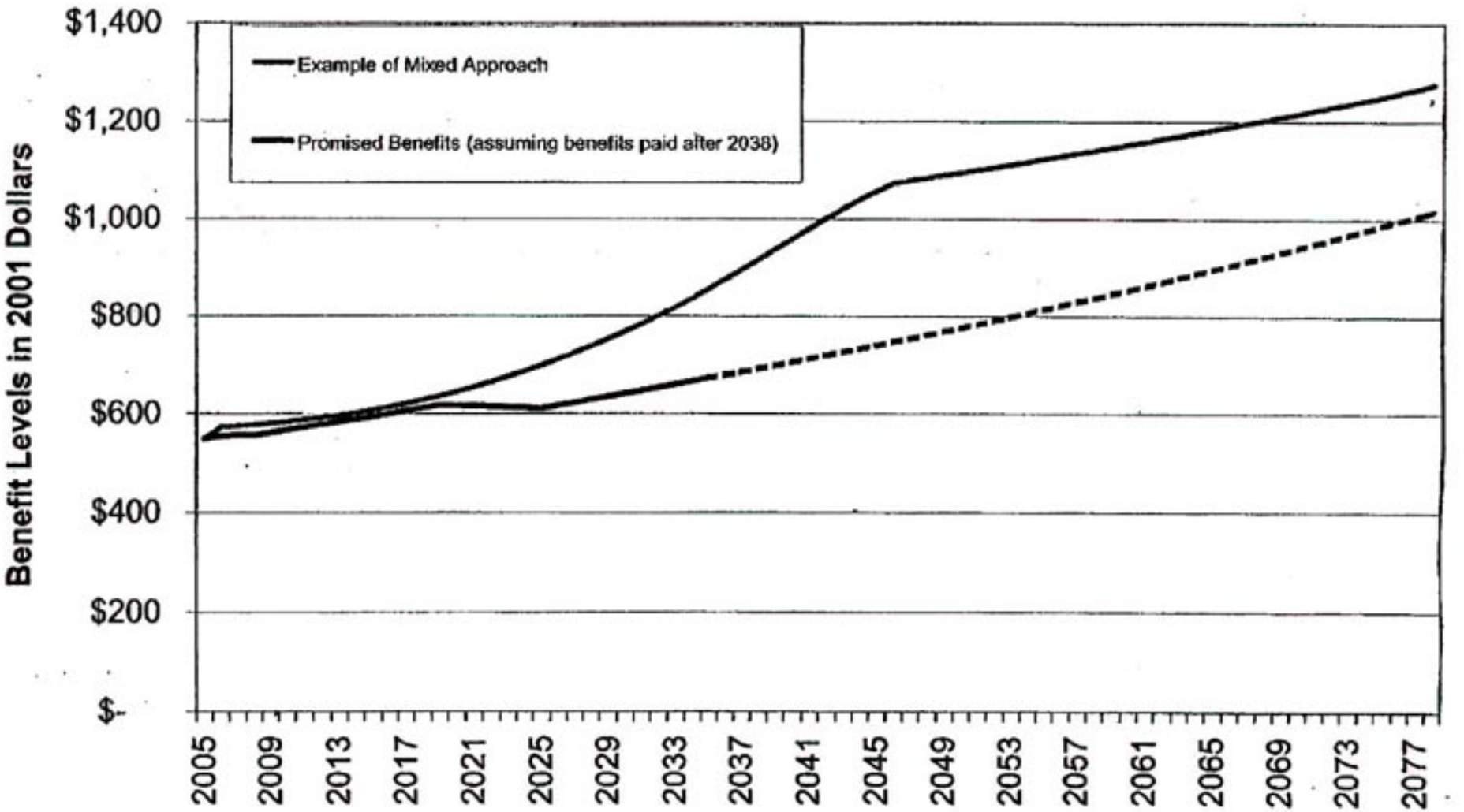
## Mixed Account Plan

- A voluntary 5% account, 3.75% of which is from Social Security revenues. 1.25% from additional voluntary contribution (a 3 for 1 match rate).
- Instead of current Social Security benefit, people receive $400 in 2001 dollars plus the real value of their contributions (employee share only).
- System is balanced over 75 years with growing surpluses thereafter.


System Costs Including Personal Accounts
System Cost as a Percent of Wages
20
18
16
14
12
10
8
6
4
2
0
Example of Mixed Approach
Current System (assuming general revenues prevent bankruptcy)
2001
2005
2009
2013
2017
2021
2025
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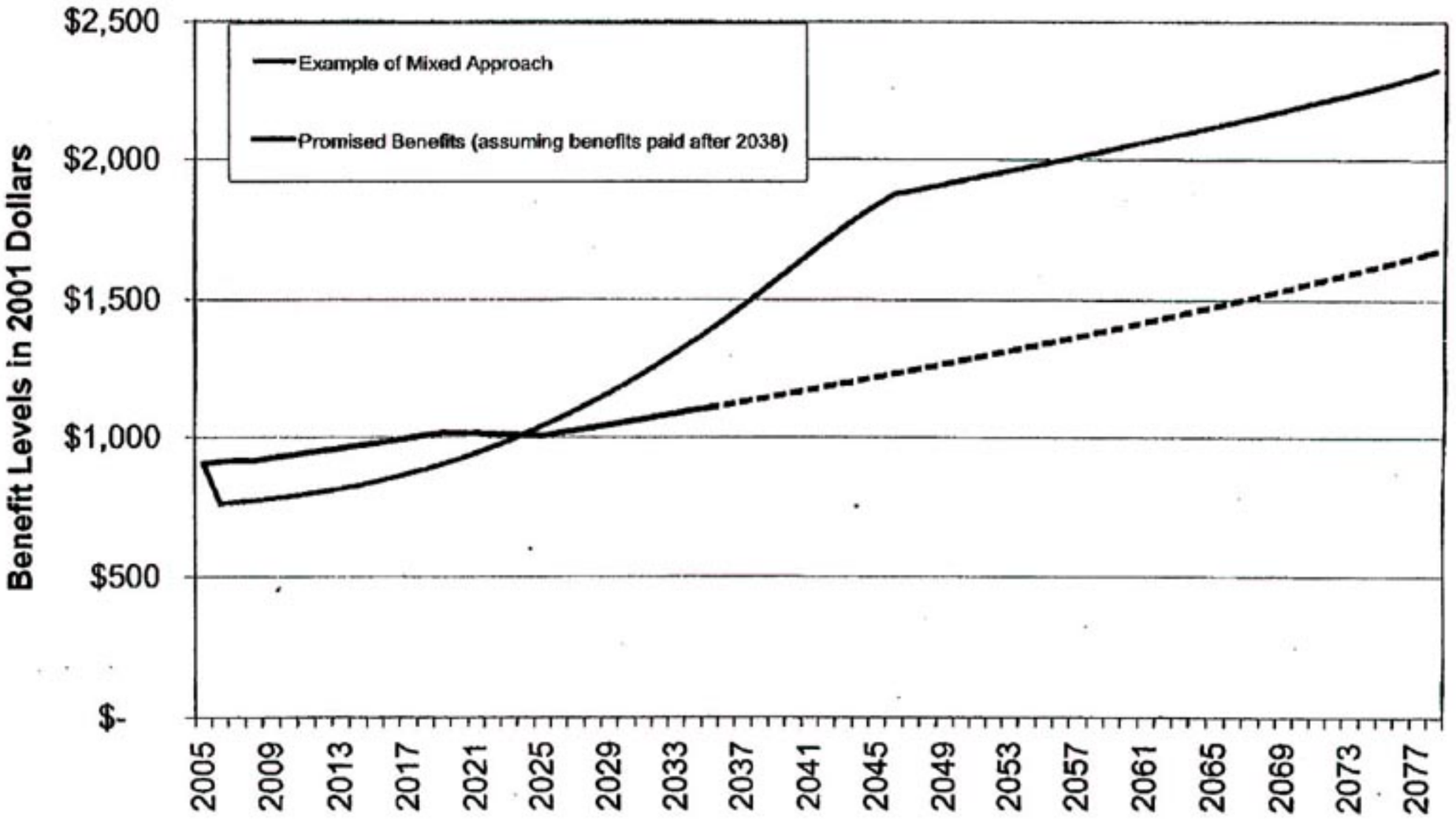
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# Career Low Earner Benefit at Age 65 With a 5.15% Real Return

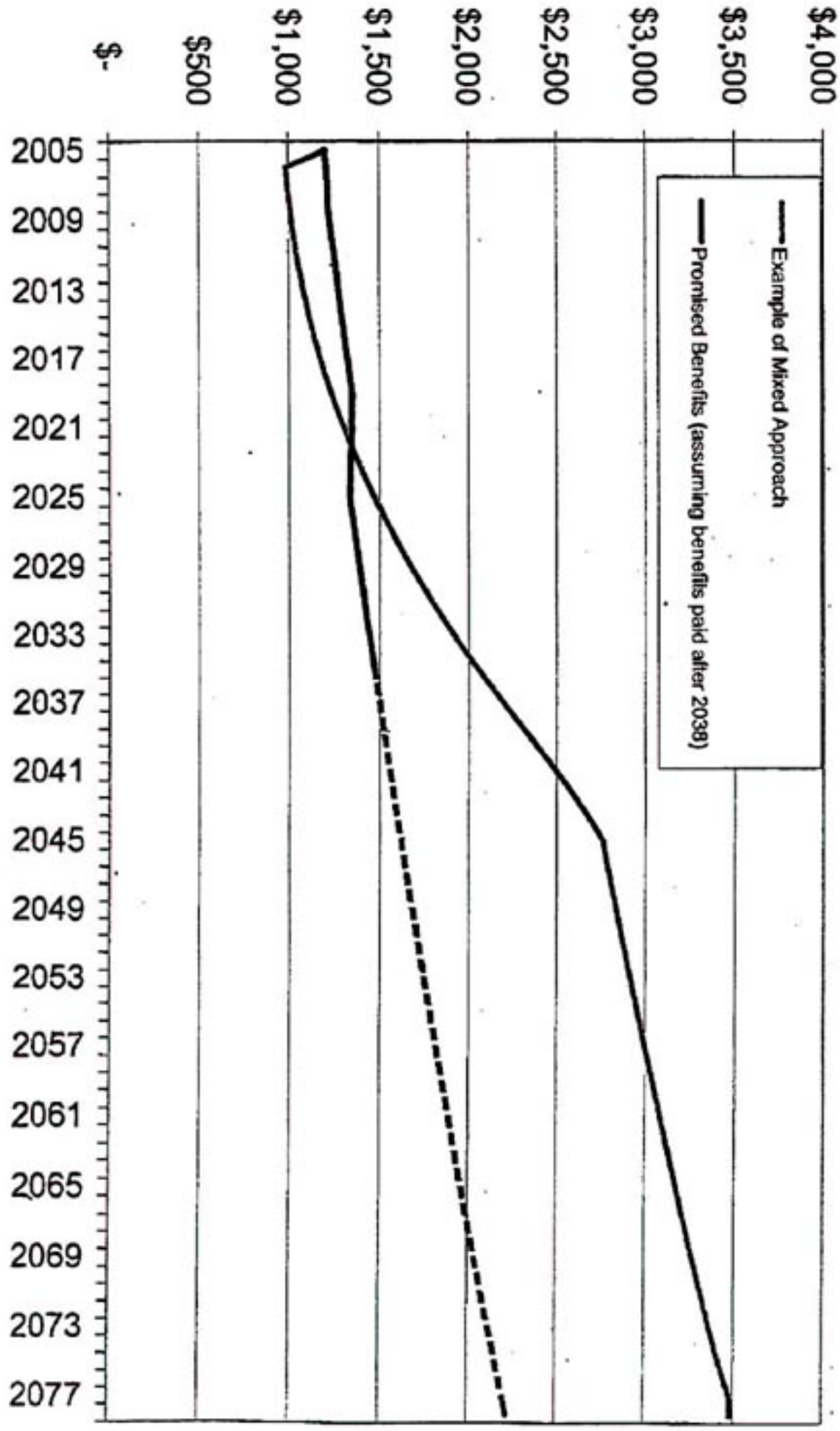


202 395 6958 P.15
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# Career Average Earner Benefit at Age 65 With a 5.15% Real Return



# Career High Earner Benefit at Age 65 With a 5.15% Real Return



November 21, 2001

Defense Intelligence Agency report

Re: Assassination of Northern Alliance Commander Ahmad Shah Masoud prior to the September 11 attacks.

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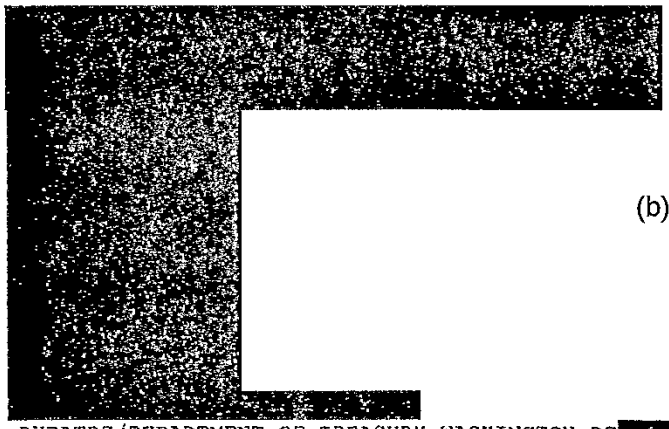
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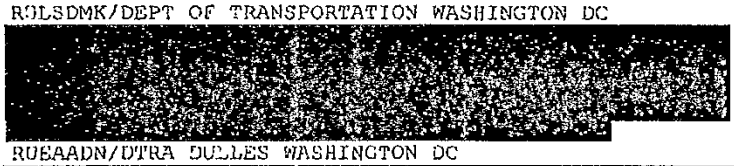
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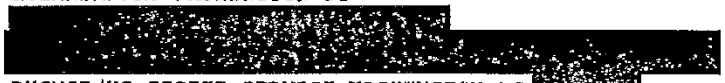
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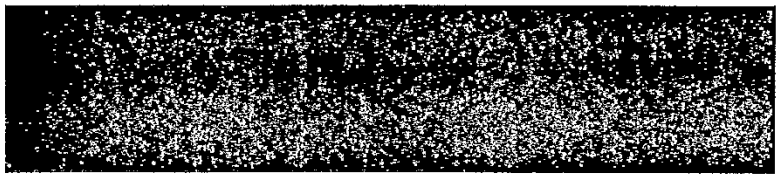
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CONTROLS
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SERIAL: (U) IIR [redacted] (b)(2)

TEXT
-
COUNTRY: (U) AFGHANISTAN (AF).
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IPSP: (U) [redacted] (b)(2)
-
SUBJ: IIR [redacted] - THE ASSASSINATION OF MASSOUD RELATED TO 11 SEPTEMBER 2001 ATTACK (U)
-
WARNING: (U) THIS IS AN INFORMATION REPORT, NOT FINALLY EVALUATED INTELLIGENCE. REPORT CLASSIFIED ~~S E C R E T NOFORN~~.
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DEPARTMENT OF DEFENSE

DQI: (U) 20010400.
-
REQS: (U) [redacted] (b)(2)
-
SOURCE: ~~(S/NF)~~ [redacted] (b)(1)

SUMMARY: ~~(S/NF)~~ THE RELATIONSHIP BETWEEN THE ASSASSINATION OF THE LATE NORTHERN ALLIANCE COMMANDER MASSOUD AND THE TERRORIST INCIDENT OF 11 SEPTEMBER 2001, INCLUDING AL-QAIDA INVOLVEMENT.
-
TEXT: 1. ~~(S/NF)~~ BACKGROUND. IN THE EARLY 1990'S, THE TALIBAN BEGAN AS A GROUP OF RELIGIOUS STUDENTS WHO REJECTED THE MUJAHADIN TAKEOVER OF AFGHANISTAN. DUE TO THE PAKISTANI GOVERNMENT SUPPORT TO TALIBAN FORCES, THE TALIBAN BECAME MILITARILY POWERFUL AND THEIR FORCES CONTROLLED APPROXIMATELY 90 PERCENT OF AFGHANISTAN. MANY AFGHAN OPPOSITION FORCES WERE OUTNUMBERED AND OUTGUNNED BY TALIBAN FORCES, AND COULD NOT FIGHT THE TALIBAN FORCES DIRECTLY. THE FORMER MUJAHADIN COMMANDER, AHMED SHAH ((MASSOUD)) MANAGED TO FORM THE NORTHERN ALLIANCE FORCES (NAF) AND CONTINUED HIS FIGHT AGAINST TALIBAN FORCES IN NORTHERN AFGHANISTAN [redacted] (b)(1)
. ON 9 SEPTEMBER 2001, COMMANDER MASSOUD WAS ASSASSINATED IN NORTHERN AFGHANISTAN.
-
2. ~~(S/NF)~~ WARNING. THROUGH NORTHERN ALLIANCE INTELLIGENCE EFFORTS, THE LATE COMMANDER MASSOUD GAINED LIMITED KNOWLEDGE REGARDING THE INTENTIONS OF THE SAUDI MILLIONAIRE, USAMA ((BIN LADIN)) (UBL), AND HIS TERRORIST ORGANIZATION, AL-QAIDA, TO PERFORM A TERRORIST ACT AGAINST THE U.S., ON A SCALE LARGER THAN

THE 1998 BOMBING OF THE U.S. EMBASSIES IN KENYA AND TANZANIA [redacted] IN APRIL 2001, MASSOUD ADDRESSED THE FRENCH AND EUROPEAN PARLIAMENTS IN PARIS. IN HIS TELEVISED SPEECH HE WARNED THE US GOVERNMENT ABOUT UBL [redacted] (b)(1)

3. ~~(S/NF)~~ RELATIONSHIPS. ON 9 SEPTEMBER 2001, TWO ARABS, LOYAL TO UBL AND MEMBERS OF THE AL-QAIDA ORGANIZATION DECEPTIVELY POSED AS ARAB JOURNALISTS, ASKED FOR AN INTERVIEW WITH COMMANDER MASSOUD, AND KILLED HIM WITH A SUICIDE BOMB THAT WAS HIDDEN IN THEIR CAMERA [redacted] ALTHOUGH COMMANDER MASSOUD WAS FIGHTING TALIBAN FORCES OVER THE CONTROL OF AFGHANISTAN, HE WAS NOT A THREAT TO UBL AND THE AL-QAIDA ORGANIZATION. TO MASSOUD, UBL WAS A SAUDI CITIZEN, EXILED TO AFGHANISTAN DUE TO HIS CHALLENGE TO THE LEGITIMACY OF THE SAUDI MONARCHY. AFTER THE TERRORIST STIKES ON THE U.S. EMBASSIES IN AFRICA, AND RECEIVING INTELLIGENCE FOR HIS FORCES REGARDING UBL'S FUTURE ATTACKS, MASSOUD BEGAN TO WARN THE WEST OF UBL AND AL-QAIDA [redacted] (b)(1)

(b)(1)

COMMENTS: (C/NF) [redacted] (b)(1) (b)(3)

ADMIN
COLL: (U)
INSTR: (U)
PREP: (U) [redacted] (b)(2)
ACQ: (C)
DISSEM: (U)

WARNING: (U) REPORT CLASSIFIED ~~SECRET NOFORN~~.
DERIVED FROM: DHS SCG, OCTOBER 97
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END OF MESSAGE ~~SECRET~~

**December 6, 2001 - December 13, 2001**

**To: News Outlet Bureau Chiefs**

**From: Assistant Secretary of Defense for Public Affairs, Victoria Clarke**

**RE: Media Coverage Issues, Military Operations in Afghanistan.**

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
1400 DEFENSE PENTAGON
WASHINGTON, DC 20301-1400

PUBLIC AFFAIRS

6 December 2001

TO: Bureau Chiefs

FROM: Victoria Clarke

CC: RADM Craig Quigley

SUBJECT: Media Coverage Issues

We owe you an apology. The last several days have revealed severe shortcomings in our preparedness to support news organizations in their efforts to cover U.S. military operations in Afghanistan.

We have a significant responsibility to provide your correspondents the opportunity to cover the war. It is a responsibility that we take seriously. Our policy remains the same as it always has been: Keeping in mind our desire to protect operational security and the safety of men and women in uniform, we intend to provide maximum media coverage with minimal delay and hassle. That has not always been the case over the last few days, particularly with regard to the coverage of dead and wounded returning to the Forward Operating Base known as Rhino.

The following are actions we have taken and will take to address our responsibilities and your concerns:

- I have assigned an officer to work out of our Bahrain office whose full-time job is to stay on top of the logistics support for media ashore. Airplane flights into and out of Afghanistan; staying in touch with news organization representatives on changes; keeping the master list of who wishes to go into Afghanistan – all of it. Major Robert Winchester can be reached in Bahrain at 973-724-561/027.

- We have decided we need more senior, more experienced PAOs on the ground in Afghanistan who can better handle the challenges. These officers will also facilitate access, filing, communication with higher headquarters – all of it. They will be stationed at Bagram Airfield, Mazar-e Sharif and Rhino within the next week. We will provide you their names and contact information as soon as possible.

- We have stationed three military PAOs at Bagram, and three are enroute to Mazar-e Sharif, that are able to provide filing and access support to your efforts from within the country. We believe improving the communication and manning of our press centers at Bagram Airfield and Mazar-e Sharif will provide better and faster access to our troops there.

- Today, we reissued public affairs guidance to all our subordinate commands so that everyone understands Secretary Rumsfeld's and General Franks' intent – maximum coverage, minimum hassle.

- As ever, our primary goal is longer duration, larger numbers and unilateral filing status for news organizations covering the military action in Afghanistan. We remain committed to achieving that goal.

The road ahead will not be easy. While we cannot do everything you might want in covering this most unconventional of wars, we can guarantee one thing: we will keep the lines of communication with you open at all times to address these and other issues.

DRAFT

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
1400 DEFENSE PENTAGON
WASHINGTON, DC 20301-1400

PUBLIC AFFAIRS

MEMORANDUM FOR: News Media Bureau Chiefs

SUBJECT: Selection for Secretary of Defense Trips

The attached documents outline the procedures and policies by which OSD (PA) will select media to travel with the Secretary of Defense.

Individual correspondents, bureau chiefs and DOD public affairs officials contributed significantly to the development of this process with their advice and recommendations. These decisions are based largely on their input. Additional criteria that weighed heavily in reaching these decisions include:

- Size and scope of news organizations
- Commitment to on-going coverage of the Pentagon
- Representation of DOD's diverse audiences

These criteria, admittedly, contain quantitative and qualitative considerations. Simply selecting the largest media organizations every time would ignore outlets that reach diverse and important constituencies. Although we will not make everyone happy, we do think this system provides a balanced and predictable method for selection of the Secretary's traveling press contingent.

Victoria Clarke
Assistant Secretary of Defense
for Public Affairs

Attachments

DRAFT

DRAFT

## Selection Procedures for Secretary of Defense Traveling Press

1. **Selection Criteria:** The selection of news media accompanying the Secretary of Defense on trips is based on a number of criteria, but the driving factor in how many members of the media are allowed to actually travel with the Secretary is the size of the plane assigned to the trip and the number of seats allocated to Public Affairs. We will always try to accommodate as many members of the media, representing as many disciplines in the media as possible.

2. **Media Categories:** We will consider media in the following categories when

considering and selecting specific travelers. The OASD(PA) Press Operations office will be responsible for establishing and maintaining appropriate rotating travel rosters:

- Wire Services (AP, Reuters, AFP. Others on a rotating basis)
- Electronic Media (TV)
- Electronic Media (Radio)
- Large newspaper/news service/magazines – those organizations with audited circulations of at least 500,000 which cover the Pentagon on a regular basis.
- Small newspaper/news service/magazines – all organizations not covered in the large category.
- Photo (and all others not covered above)

DRAFT

3. **Selection Criteria:** Assume a seat allocation of 13. Pool rules do not necessarily apply in this situation and should be addressed in the planning stages of each trip. In any case, if there are five seats or less available, all products of the traveling media will be pooled. If more than 13 seats are available, they will be offered to news organizations in the following order: TV, radio, large newspapers, small newspapers, photo, wires.

   Allocated seats will be assigned like this (cuts, based seats available, will come from the bottom):

   1. AP
   2. TV Correspondent
   3. TV Camera (Pool)
   4. Reuters
   5. AFP
   6. TV
   7. TV
   8. Large newspaper/news service/magazine
   9. Small newspaper/news service/magazine
   10. Large newspaper/news service/magazine
   11. Radio
   12. Photographer
   13. Rotating wire service

4. **Selecting Media:** Within a group, media outlets will initially be ranked based on their deliberate and long-term commitment (prior to September 11, 2001) to covering the Pentagon and the Secretary of Defense's traveling schedule. Once the initial list (group-level) is established, a numerical rotation will determine the media organizations that are invited to travel on the next trip. To avoid manipulation of the roster, if trip selection is offered to a media outlet and is subsequently turned down, that organization will move to the bottom of the list. Organizations that would like to be included after the initial rotation is established will be vetted for continuing commitment to covering the Pentagon, then added to the bottom of the roster.

5. Unique situations will be considered and adjudicated on a case-by-case basis by the ASD(PA).

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
1400 DEFENSE PENTAGON
WASHINGTON, DC 20301-1400

PUBLIC AFFAIRS

13 December 2001

# The Way Ahead in Afghanistan

1. We intend to put in place a total of three nearly-identical Coalition Press Information Centers (CPICs) in Afghanistan at Mazar-e Sharif, Bagram and Qandahar Airport.

2. We envision having 5-10 public affairs staff at each site, with rudimentary communication capability (small numbers of cell phones, e-mail, etc.).

3. Function of staff at each site is to facilitate access to U.S. and coalition forces that are posted there. That means interviews, camera access – anything we can provide within available resources to help you do your job.

4. Mazar-e Sharif. This site will become a hub of humanitarian aid activity in the northern part of Afghanistan. The runway is being repaired and upgraded by U.S. Air Force Red Horse engineers and local contractors; a Jordanian field hospital is being installed; French and American force protection soldiers are on station; and NGO reps will soon use this as a site for moving relief supplies in, then moving them further into Afghanistan.

5. Bagram. Very similar function in the east central part of Afghanistan. Runway here is being repaired and upgraded by U.S. Navy SEABEES and local contractors; a Jordanian mine flail called an Aardvark is clearing mines and unexploded ordnance; American 10th Mountain Division soldiers are providing perimeter security; and NGO reps will soon be here as well.

6. Qandahar Airport. Same function in southwestern Afghanistan. This site still immature and many days away from a useable runway, living conditions, etc., but ultimate goal remains the same.

7. Access. We hope to transition to a round-robin military aircraft leaving Bahrain weekly and moving news media reps to Qandahar – Bagram – Mazar – Bahrain. Will be coordinated out of a small (3-5 people) logistics cell in Bahrain. Don't have this set up yet, but we envision matching schedules, desires of correspondents and availability of our forces on the ground as much as possible to help you do your job. This system would remain in place until U.S. military forces leave Afghanistan or news interest fades.

**OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE**
**1400 DEFENSE PENTAGON**
**WASHINGTON, DC 20301-1400**

**PUBLIC AFFAIRS**

OEF/OSW Public Affairs Contacts 12 December, 2001

**CENTCOM/PA**

**24 hours**
Comm: (813)827-6762
Unclas Fax: (813)840-5629
E-mail: mcgeebk@centcom.mil
Additional E-mail: wallacma@centcom.mil

**CENTAF/PA (SHAW AFB SC)**

**Capt Richard Johnson**
Comm: (803)895-2875/3
Fax: (803)895-2871
E-mail: johnson.richard@shaw.af.mil

**JTF-SWA/PA**

**Major Brett Morris**
Comm: 966-1-478-1100, then 433-3732
E-mail: jtfswa.pa@psab.af.mil

**MARCENT**

**LTCOL Pat Sivigny, PAO**
Comm: (808)477-8308
Fax: (808)477-8715
E-mail: sivignyPA@mfp.usmc.mil

**NAVCENT/PA (Bahrain)**
**Also logistics hub for TF 58 flights; co-located**

**CDR Jeff Alderson (Navy questions and ship embarks)**
**Major Rob Winchester (flight details into Afghanistan)**
Comm: 011-973-724-007/561/562/027/510
E-mail: pao@cusnc.navy.mil

**SAF/PA CENTAF-Watcher**

**Major Donna Nicholas**
Comm: 703-697-5175
E-mail: donna.nicholas@pentagon.af.mil

**U.S. Embassy,Riyadh,KSA**

**Dr Rick Roberts**
Comm: 99-488-3800 ext. 1257

**U.S. Embassy,Kuwait**

**Director: Molly Phee**
Comm: 99-00-965-539-0373
E-mail: pheemc@state.gov

**Islamabad, Pakistan**

**BG Hawkins or Major Morris (CIC PK)**
Comm: 011-925-128-70428

**CJFLCC, Kuwait**
**LTC Bonnie Herbert (CJFLCC PA)**
Comm: 011-965-468-8040

**UK Ministry of Defense Press Office**

Comm: 011-44-207-218-3256

**Rhino (Task Force 58, Media Center Bahrain)**

**Major Hughes**
Comm: 00-973-920-7724

**January 4, 2002**

**Memorandum from: Treasury Department Public Relations Chief, Michele Davis**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: How to Handle Tim Russert During an Appearance on NBC's "Meet the Press"**

From Michele Davis 1/4

**Sunday TV – Meet the Press**

8:30 AM
10 minute segment

Other guests: McCain and Lieberman from Uzbekistan
Karzai

**MESSAGE**

FIRST ANSWER, no matter the question:
We must act to ensure our economy recovers and people get back to work.

**KEY LINES TO DELIVER:**

An economic security package to make the recession shorter and put people back to work faster.

Creating jobs is the key to success.

a growing economy creates a budget surplus, not the other way around

If the Senate Majority Leader is serious about helping put people back to work, then we should have TPA and the economic security package on the President's desk by March 1.

**WORD CHOICES**:

"Economic Security" not "stimulus"
talk about people, and their jobs, not "growth" and "surplus"

**TONE:**

The economy is showing some signs of recovery, but they haven't yet solidified and we need to act to speed the recovery, because there's no reason people should be out of work for any longer than is necessary.

On questions about the state of the economy, we can't just cite good stats, we need to talk about both the good and bad signs:

- Unemployment went up, but not as much as it could be
- WSJ poll, average expect 0.9 % growth in Q1
- Car and truck sales had the second strongest year to date, but they slowed in December

**LIKELY QUESTIONS:**

1. State of the Economy

The first several questions are likely to be about the state of the economy – without Russert mentioning the President's agenda or anything else related to Washington. You need to interject the President's message, even if the question has nothing to do with that.

EXAMPLE: "What is the state of the economy today?"

A. We're seeing hopeful signs of a recovery, but they aren't as strong as we'd like them to be. Too many people are without a job right now. But confidence is up, which is a good sign. I saw in the WSJ that a consensus estimate on growth is something like 0.9% for the first quarter. That's growth, but it's just not good enough. The President doesn't want us to sit on my hands and hope this recovery takes root. We need to act, to get people back to work more quickly and get the economy growing again.

2. Daschle's accusations.

Russert will ask about Daschle's accusations that the tax cut created the deficit. You need to say in a very succinct sentence that the terrorist attacks and the recession caused the deficit. You can give the numbers (attached), but don't only give the numbers. First, give a clear succinct sentence. Russert likely will ask a series of questions about the deficit. You shouldn't make any projections – budget numbers are still weeks away.

Q Are you willing to increase the deficit to pay for a stimulus package we may not need, since the economy is already showing signs of recovery.

A. (You need to respond very strongly that our primary concern is putting people back to work.) Millions of people don't have jobs right now, because our economy isn't growing. That has to be our primary concern. When people go back to work, the economy grows and the deficits disappear.

Q. Let me follow up to that: does the deficit not matter at all? Should we repeal the cut in the top tax rate to fill that hole?
A. Even Senator Daschle didn't suggest that. Because everyone knows, raising taxes slows the economy – exactly the medicine we don't need right now.

Q. Is this the old, failed 1980s rhetoric about growing our way out of a deficit?
A. In the 1980s, the economy grew and revenues to the Treasury grew a lot. The problem was that government spending grew even faster. What we learned from the mid 1990s is that economic growth, combined with spending discipline, is the path to budget surpluses.

Q. Your asking for an increase in the debt ceiling, too. Isn't that an admission that the tax cut was too big?
A. We need an increase in the debt ceiling because of the recession and the war. We are going to defeat terrorism abroad and we are going to create jobs here at home. That requires the

government to borrow more money this year, an obvious price we are willing to pay to ensure our safety and prosperity here at home.

Q. In 1997, the Republican Congress refused to raise the debt ceiling when Rubin asked them to do so. Will you get the same reaction?
A. It's inconceivable that they won't raise the debt ceiling. Our economy was wracked by a terrorist attack and a recession. We need the tools to defeat terrorists abroad and reignite growth at home.

3. Daschle's proposals

Expect a series of questions about any of the particulars of Daschle's proposals. But don't answer only by critiquing that proposal. Instead, flip the question to talk about why the President's proposal is the right way to ensure a stronger recovery.

Q. Would you consider a new-worker tax credit, to encouraging hiring?
A. Do you think NBC might just fire everyone and rehire them to get a tax credit? Wouldn't that be nuts? The President has proposed the right tax incentives to create jobs – reducing income taxes on millions of small businesses, accelerating expensing of new investments, and fixing the corporate AMT so it doesn't raise taxes on companies when they are doing their best to avoid laying off workers.

4. Likelihood of enacting anything.

Senator Daschle said "We should move quickly to pass a bill that boosts demand, encourages investments, and creates jobs." Those are words the President has said many times. So you should welcome Senator Daschle's new willingness to enact an economic security package. You should also bring up dislocated workers as a reason you think we will get something done. And then give your deadline.

Q. Isn't this just posturing? You guys want to show the unemployed that you care. Will anything actually get done?
A. There's only one way to find out, Tim. Senator Daschle showed new willingness to enact an economic security package. He called for action to help strengthen our recovery. He's in charge in the Senate. So if he's serious, he will have Trade Promotion Authority and the economic stimulus package through the Senate by March 1.

Q. Would you be willing to drop the tax rate cuts to get the rest of the package done?
A. Millions of small businesses pay individual income taxes – not corporate income taxes. And those small businesses are the engines of job creation in our economy. We need to give them relief so they can invest and hire.

Q. Since you all can't agree on tax cuts, why not just do the package for dislocated workers?
A. People don't just want help while they are out of work, they want jobs. And even on the dislocated worker package, in December Senator Daschle objected to our proposal to give unemployed Americans a tax credit to pay for 60% of their health insurance costs. Insurance is enormously expensive for so many of these families – that's got to be part of the help we give.

**January 8, 2002**

**Memorandum from: Michele Davis**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: Terrorist Asset List**

# MEMO

To: Secretary O'Neill
From: Michele
Date: 1/8/02
Re: Tomorrow's terrorist finance announcement

We have scheduled a press conference for 1:30 PM to announce the latest listing. Attached is a draft statement for you to read at that event. We spent most of the day making sure we had the facts straight, so I will go over it once again tonight to give it a little more punch.

Attached is also a list of possible questions and suggested answers. We won't take too many questions at the press conference, and anything that is very detailed you can refer the reporter to the press office for further information.

DRAFT REMARKS ON NEXT TERRORIST ASSET LIST

Good afternoon. Today we listed four more terrorist entities - two organizations and two individuals – and blocked their assets in the United States. While portraying themselves as legitimate charitable enterprises, these two organizations and associated individuals have engaged in fundraising activities for Usama bin Laden and al Qaeda. We've now listed 168 individuals and organizations in the US. Let me take a moment to highlight our progress in shutting down these terrorist financiers' access to not only the US financial system, but the world financial system they rely on to purchase the tools of their evil acts.

As you have all read in the news, Treasury law enforcement, the FBI, and other federal agents have traced much of the money that was wired to the hijackers who wreaked terror on the United States on September 11. Money was transferred to the US, in dollars. No one mailed a check from Afghanistan, or even wired money from Afghanistan. The organizers of that horrible attack had to convert their money to dollars and wire it from a financial center, in this case Dubai. A terrorist organization wanting to send money into the US has to be able to turn their local currency into dollars, and it isn't possible to do that in large quantities except in larger money centers around the world. Places like NY, London, Dubai, and Hong Kong. The world financial system works like a hub and spoke system, and these financial centers are the hubs. The most efficient way to move money from a non-hub city to anywhere else in the world is through a bank in a financial center.

To shut terrorists out of the world financial system then, we need to shut down their access to the hubs of financial activity around the world. A principal means of doing this is through the United Nations. On December 2000, the UN passed UNSCR 1333, requiring every member nation to block the assets of groups listed on the resolution as funders of al Qaida. Since September23, every time we designate a new entity for blocking in the US because they are associated with financing al Qaida, we then submit those names to the UN for addition to UNSCR 1333. So far, there are 124 names on the UNSCR list. Once the UN adds those names, nations around the world block their assets. On September 28, the UN passed UNSCR 1373, requiring every member nation to block the assets of all terrorist financiers, not just the Taliban and al Qaeda. Each nation adds a brick in the wall that denies terrorists access to the world financial system.

So far, Canada and Luxembourg have blocked all the names we have blocked and the UK has blocked all but a handful. After receiving each new list of terrorists from the US, the Hong Kong Monetary Authority has directed banks and other financial institutions to search for accounts under these names. Switzerland has blocked 30 terrorist-related accounts containing 15 million dollars (24.9 million Swiss francs) since September 11. The UAE has blocked on several of the US lists, and publicized an additional list of 30 companies with suspected terrorist links. Their action to block the al Barakaat network effectively shut down the operation worldwide.

When the terrorists have nowhere to turn to transfer money, they are reduced to much riskier ways of financing their evil. They have to smuggle cash into the US, which is a crime US Customs can arrest them for.

The web is closing. Because our allies in the money centers around the world are working with us, terrorists who may still have resources well hidden somewhere remote can no longer move that money around the world with ease. Imagine you had no checking account through which to pay your bills, and instead you had to carry cash and wait in line to pay the phone bill, then the electric and then the water. Even if you have the cash, think about how much more time and effort is involved, how much more risk of the money not getting there on time. These are the pains we are inflicting on the financiers of terrorism.

Q and A

Q. Are you alleging that the charities themselves are bad, or just branches of the charities?
A. The ASC is a tool of al Qaida. The RIHC headquarters in Kuwait may have no knowledge of what its affiliates in Pakistan and Afghanistan are doing.

Q. How is ASC linked to al Qaida?
A. We have solid information that ASC is funding al Qaida by misleading other NGOs into believing they are donating to help orphans. This is an appalling abuse of those people who are eager to fund real charitable activity.

Q. Are you alleging that hose who donate are aware that their donations are going to al Qaida?
A In many instances, these organizations preyed upon people who simply wanted to help orphaned children. These organizations took money from orphans and gave it to terrorists.

Q. Have you had cooperation from the Kuwaitis?
A. We're pleased with the cooperation they've provided. I defer to them to give you details on their cooperation.

Q. Have you had cooperation from Saudi Arabia?
A. We're pleased with the cooperation they've provided. I defer to them to give you

Q. Have you had cooperation from Pakistan?
A. We're pleased with the cooperation they've provided.

Q. Did any other nations block simultaneously?
A. We shared information with our allies in advance of today's designation, and several of them have blocked these organizations in coordination with us. We can provide specifics later, once we collect all the information on today's activities.

Q. How much do you expect to freeze in the US today?
A. We are not aware of any US accounts held by these organizations or individuals. The primary purpose of our action today is to cut off current and future access to the US financial market. With out action today we are putting citizens of the world on notice not to do business with these organizations and individuals who are doing business with al Qaida . Now that we have designated them under the Executive Order, we will present the names to the United Nations for addition to the UNSCR requiring all nations to block the assets of listed groups.

Q. Why hasn't the total dollar amount frozen world-wide not increased up much recently?
A. Many nations are quietly participating in our effort, and therefore don't publicize their actions. In addition, the dollars frozen is only a small part of the effectiveness of this effort. Think of each of these accounts as part of a pipeline – every time we freeze an account, we not only capture what's in the account at this time, but also prevent future use of that pipeline. In the case of the Holy Land Foundation, for example, we froze hundreds of thousands of dollars in the United States, but the impact is far greater – Holy Land Foundation raised $13 million in the United States in 2000 and will not raise a penny going forward.

Q. What about money centers like Frankfurt, Singapore?
A. I couldn't mention everyone in my prepared remarks. Germany has blocked every name that we have, and we are pleased with the cooperation we've had from Singapore as well.

Q. Yasin al Qadi has petitioned OFAC to be removed from the list. Was the US wrong? What is the procedure for reviewing his request?
A. We are confident in our evidence. We'll review his request, and be happy to discuss it with him. There is a procedure that has been in place for some time for reviewing these kinds of requests.

Q. Holy Land Foundation has requested OFAC grant them a license to use some of their frozen assets to pay bills, including legal bills. Will they get that license? Should they be granted access to their funds to pay lawyers to make their case for delisting?
A. We don't discuss license requests that are under review. This is a standard process, and will be handled like all other requests.

Q. Today's designations are al Qaida related. Are you shying away from designating other groups, after seeing how the designation of the Kashmiri groups fed the tensions between India and Pakistan?
A. We are focused on denying all terrorists access to funds to pay for their evil acts. Our primary focus is al Qaida, but it is by no means our sole focus. We have a process in place to keep moving forward, adding new names as the information comes together.

Q. The US still hasn't designated 21 terrorists named for blocking by the EU on December 28. How can you ask coalition members to designate US names and trust that the US is right, when you won't do the same for the EU?
A. We are reviewing the evidence, and will make a designation as soon as we are able to do so. We are very happy that the EU took this step to name terrorist organizations – we urge every nation to help us identify terrorist financers whose activities must be stopped.

Q. Do you have Treasury teams in Saudi Arabia, Kuwait, etc?
A. We have sent people to several nations, for the purpose of gathering evidence, sharing evidence and providing technical assistance. We are happy to support other nations in their efforts to crack down on terrorist financing. I'm not going to discuss any particular trips.

January 9, 2002

Defense Intelligence Agency Report

RE: Pakistani Political, Military Situation, and Terrorism Issues

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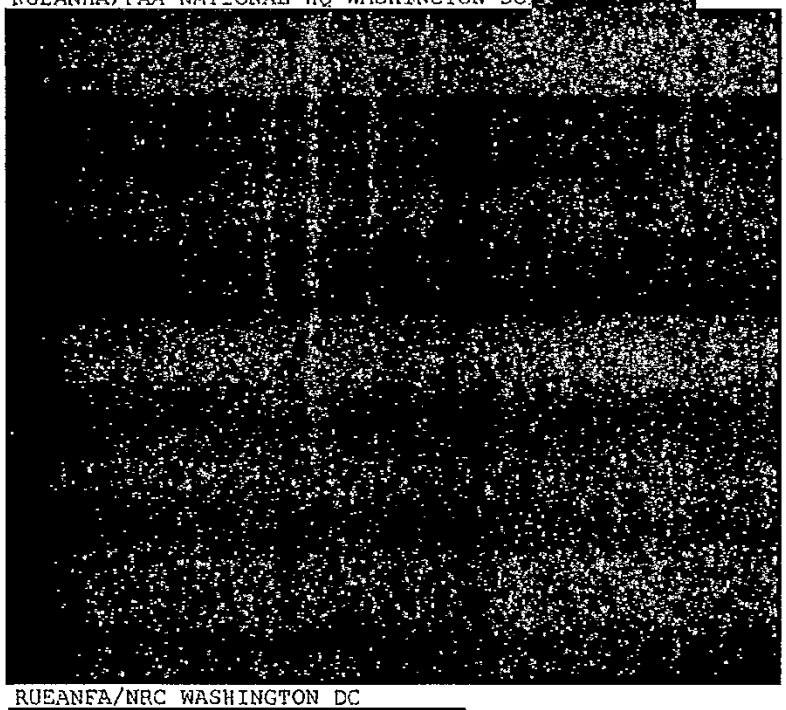
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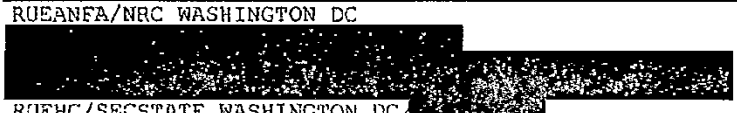
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COUNTRY: (U) PAKISTAN (PK); AFGHANISTAN (AF).
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SUBJ: TIR [redacted] - PAKISTANI POLITICAL, MILITARY SITUATION, AND TERRORISM ISSUES (U) (b)(2)
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DEPARTMENT OF DEFENSE
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REQS: (U) [redacted] (b)(2)
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SOURCE: ~~(S/NF)~~ [redacted] (b)(1)
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SUMMARY: ~~(S/NF)~~ THIS REPORT CONTAINS INFORMATION ON THE POLITICAL AND MILITARY SITUATION IN PAKISTAN INCLUDING PAKISTANI GOVERNMENT STABILITY, PAKISTANI ARMED FORCES CAPABILITIES, AND TERRORISM ISSUES.
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TEXT: 1. ~~(S/NF)~~ [redacted] (b)(1)
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2. ~~(S/NF)~~ PAKISTANI GOVERNMENT STABILITY. THE PAKISTANI GOVERNMENT WAS STABLE AND THERE WAS NO CHANCE THAT ANY GROUPS WITHIN PAKISTAN, INCLUDING THE INTELLIGENCE ORGANIZATION, WOULD OVERTHROW THE GOVERNMENT. THE ONLY FORMATION CAPABLE OF OVERTHROWING THE GOVERNMENT WOULD BE THE PAKISTANI ARMED FORCES.
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3. ~~(S/NF)~~ TERRORISM ISSUES. MANY PEOPLE IN PAKISTAN FEARED THAT DEFEAT OF THE TALIBAN/AL-QAIDA FORCES WOULD CAUSE MORE ATTACKS ON WESTERNERS IN PAKISTAN. THE PAKISTANI GOVERNMENT WOULD NOT OFFICIALLY HIDE ANY TALIBAN/AL-QAIDA TERRORISTS UNLESS IT WOULD BE BENEFICIAL TO THEIR SECURITY INTERESTS. THERE WERE MANY ORGANIZATIONS WITHIN PAKISTAN, WHICH WOULD PROVIDE SHELTER AND SUPPORT TALIBAN/AL-QAIDA TERRORISTS. [redacted] (b)(1)
[redacted] IN THE EYES OF MANY PAKISTANI PEOPLE (LOW CLASS), WHAT WESTERN WORLD PERCEIVES AS TERRORISTS; TO THEM, THEY ARE FREEDOM FIGHTERS OR MOSLEM FIGHTERS OF THE SAME FATE (NFI).

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**January 9, 2002**

**Department of Justice Memorandum From: Deputy Assistant Attorney General, John Yoo and Special Counsel, Robert J. Delahunty**

**To: William J. Haynes II, General Counsel, Department of Defense**

**RE: Application of International Law to Terrorist Detainees**

U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

January 9, 2002

**MEMORANDUM FOR WILLIAM J. HAYNES II**
**GENERAL COUNSEL, DEPARTMENT OF DEFENSE**

DRAFT

**FROM:** John Yoo
Deputy Assistant Attorney General

Robert J. Delahunty
Special Counsel

**RE:** *Application of Treaties and Laws to al Qaeda and Taliban Detainees*

You have asked for our Office's views concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan. In particular, you have asked whether the laws of armed conflict apply to the conditions of detention and the procedures for trial of members of al Qaeda and the Taliban militia. We conclude that these treaties do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that that these treaties do not apply to the Taliban militia. This memorandum expresses no view as to whether the President should decide, as a matter of policy, that the U.S. Armed Forces should adhere to the standards of conduct in those treaties with respect to the treatment of prisoners.

We believe it most useful to structure the analysis of these questions by focusing on the War Crimes Act, 18 U.S.C. § 2441 (Supp. III 1997) ("WCA"). The WCA directly incorporates several provisions of international treaties governing the laws of war into the federal criminal code. Part I of this memorandum describes the WCA and the most relevant treaties that it incorporates: the four 1949 Geneva Conventions, which generally regulate the treatment of non-combatants, such as prisoners of war ("POWs"), the injured and sick, and civilians.[1]

Part II examines whether al Qaeda detainees can claim the protections of these agreements. Al Qaeda is merely a violent political movement or organization and not a nation-state. As a result, it is ineligible to be a signatory to any treaty. Because of the novel nature of

[1] The four Geneva Conventions for the Protection of Victims of War, dated August 12, 1949, were ratified by the United States on July 14, 1955. These are the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3115 ("Geneva Convention I"); the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3219 ("Geneva Convention II"); the Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3517 ("Geneva Convention III"); and the Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3317 ("Geneva Convention IV").

this conflict, moreover, we do not believe that al Qaeda would be included in non-international forms of armed conflict to which some provisions of the Geneva Conventions might apply. Therefore, neither the Geneva Conventions nor the WCA regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict.

Part III discusses whether the same treaty provisions, as incorporated through the WCA, apply to the treatment of captured members of the Taliban militia. We believe that the Geneva Conventions do not apply for several reasons. First, the Taliban was not a government and Afghanistan was not – even prior to the beginning of the present conflict – a functioning State during the period in which they engaged in hostilities against the United States and its allies. Afghanistan's status as a failed state is ground alone to find that members of the Taliban militia are not entitled to enemy POW status under the Geneva Conventions. Further, it is clear that the President has the constitutional authority to suspend our treaties with Afghanistan pending the restoration of a legitimate government capable of performing Afghanistan's treaty obligations. Second, it appears from the public evidence that the Taliban militia may have been so intertwined with al Qaeda as to be functionally indistinguishable from it. To the extent that the Taliban militia was more akin to a non-governmental organization that used military force to pursue its religious and political ideology than a functioning government, its members would be on the same legal footing as al Qaeda.

In Part IV, we address the question whether any customary international law of armed conflict might apply to the al Qaeda or Taliban militia members detained during the course of the Afghanistan conflict. We conclude that customary international law, whatever its source and content, does not bind the President, or restrict the actions of the United States military, because it does not constitute federal law recognized under the Supremacy Clause of the Constitution. The President, however, has the constitutional authority as Commander in Chief to interpret and apply the customary or common laws of war in such a way that they would extend to the conduct of members of both al Qaeda and the Taliban, and also to the conduct of the U.S. Armed Forces towards members of those groups taken as prisoners in Afghanistan.

## *I. Background and Overview of the War Crimes Act and the Geneva Conventions*

It is our understanding that your Department is considering two basic plans regarding the treatment of members of al Qaeda and the Taliban militia detained during the Afghanistan conflict. First, the Defense Department intends to make available a facility at the U.S. Navy base at Guantanamo Bay, Cuba, for the long-term detention of these individuals, who have come under our control either through capture by our military or transfer from our allies in Afghanistan. We have discussed in a separate memorandum the federal jurisdiction issues that might arise concerning Guantanamo Bay.[2] Second, your Department is developing procedures to implement the President's Military Order of November 13, 2001, which establishes military

[2] *See* Memorandum for William J. Haynes II, General Counsel, Department of Defense, from: Patrick F. Philbin, Deputy Assistant Attorney General, and John Yoo, Deputy Assistant Attorney General, *Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001).

commissions for the trial of violations of the laws of war committed by non-U.S. citizens.[3] The question has arisen whether the Geneva Conventions, or other relevant international treaties or federal laws, regulate these proposed policies.

We believe that the WCA provides a useful starting point for our analysis of the application of the Geneva Conventions to the treatment of detainees captured in the Afghanistan theater of operations.[4] Section 2441 of Title 18 renders certain acts punishable as "war crimes." The statute's definition of that term incorporates, by reference, certain treaties or treaty provisions relating to the laws of war, including the Geneva Conventions.

### A. *Section 2441: An Overview*

Section 2441 reads in full as follows:

*War crimes*

(a) Offense.–Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.–The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition.–As used in this section the term "war crime" means any conduct–

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

[3] *See generally* Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001).

[4] The rule of lenity requires that the WCA be read so as to ensure that prospective defendants have adequate notice of the nature of the acts that the statute condemns. *See, e.g., Castillo v. United States*, 530 U.S. 120, 131 (2000). In those cases in which the application of a treaty incorporated by the WCA is unclear, therefore, the rule of lenity requires that the interpretative issue be resolved in the defendant's favor.

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

18 U.S.C. § 2441.

Section 2441 lists four categories of war crimes. First, it criminalizes "grave breaches" of the Geneva Conventions, which are defined by treaty and will be discussed below. Second, it makes illegal conduct prohibited by articles 23, 25, 27 and 28 of the Annex to the Hague Convention IV. Third, it criminalizes violations of what is known as "common" Article 3, which is an identical provision common to all four of the Geneva Conventions. Fourth, it criminalizes conduct prohibited by certain other laws of war treaties, once the United States joins them. A House Report states that the original legislation "carries out the international obligations of the United States under the Geneva Conventions of 1949 to provide criminal penalties for certain war crimes." H.R. Rep. No. 104-698 at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2166. Each of those four conventions includes a clause relating to legislative implementation and to criminal punishment.[5]

In enacting section 2441, Congress also sought to fill certain perceived gaps in the coverage of federal criminal law. The main gaps were thought to be of two kinds: subject matter jurisdiction and personal jurisdiction. First, Congress found that "[t]here are major gaps in the prosecutability of individuals under federal criminal law for war crimes committed against Americans." H.R. Rep. No. 104-698 at 6, *reprinted in* 1996 U.S.C.C.A.N. at 2171. For example, "the simple killing of a[n American] prisoner of war" was not covered by any existing Federal statute. *Id.* at 5, *reprinted in* 1996 U.S.C.C.A.N. at 2170.[6] Second, Congress found that "[t]he ability to court martial members of our armed services who commit war crimes ends when they leave military service. [Section 2441] would allow for prosecution even after discharge." *Id.* at

[5] That common clause reads as follows:

> The [signatory Nations] undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention. . . . Each [signatory nation] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. . . . It may also, if it prefers, . . . hand such persons over for trial to another [signatory nation], provided such [nation] has made out a *prima facie* case.

Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

[6] In projecting our criminal law extraterritorially in order to protect victims who are United States nationals, Congress was apparently relying on the international law principle of passive personality. The passive personality principle "asserts that a state may apply law – particularly criminal law – to an act committed outside its territory by a person not its national where the victim of the act was its national." *United States v. Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir.), *cert. denied*, 525 U.S. 834 (1998). The principle marks recognition of the fact that "each nation has a legitimate interest that its nationals and permanent inhabitants not be maimed or disabled from self-support," or otherwise injured. *Lauritzen v. Larsen*, 345 U.S. 571, 586 (1953); *see also Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970).

7, *reprinted in* 1996 U.S.C.C.A.N. at 2172.[7] Congress considered it important to fill this gap, not only in the interest of the victims of war crimes, but also of the accused. "The Americans prosecuted would have available all the procedural protections of the American justice system. These might be lacking if the United States extradited the individuals to their victims' home countries for prosecution." *Id.*[8] Accordingly, Section 2441 criminalizes forms of conduct in which a U.S. national or a member of the Armed Forces may be either a victim or a perpetrator.

B. *Grave Breaches of the Geneva Conventions*

The Geneva Conventions were approved by a diplomatic conference on August 12, 1949, and remain the agreements to which more States have become parties than any other concerning the laws of war. Convention I deals with the treatment of wounded and sick in armed forces in the field; Convention II addresses treatment of the wounded, sick, and shipwrecked in armed forces at sea; Convention III regulates treatment of POWs; Convention IV addresses the treatment of citizens. While the Hague Convention IV establishes the rules of conduct against the enemy, the Geneva Conventions set the rules for the treatment of the victims of war.

The Geneva Conventions, like treaties generally, structure legal relationships between Nation States, not between Nation States and private, subnational groups or organizations.[9] All four Conventions share the same Article 2, known as "common Article 2." It states:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict *which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

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[7] In *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Supreme Court had held that a former serviceman could not constitutionally be tried before a court martial under the Uniform Code for Military Justice (the "UCMJ") for crimes he was alleged to have committed while in the armed services.

[8] The principle of nationality in international law recognizes that (as Congress did here) a State may criminalize acts performed extraterritorially by its own nationals. *See, e.g., Skiriotes v. Florida*, 313 U.S. 69, 73 (1941); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952).

[9] *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) ("A treaty is in the nature of a contract between nations."); *The Head Money Cases*, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations."); *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 167 (3d Cir. 1997) ("[T]reaties are agreements between nations."); *Vienna Convention on the Law of Treaties*, May 23, 1969, art. 2, § 1(a), 1155 U.N.T.S. 331, 333 ("'[T]reaty' means an international agreement concluded between States in written form and governed by international law. . . .") (the "Vienna Convention"); *see generally Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422 (1964) ("The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another.").

(Emphasis added).

As incorporated by § 2441(c)(1), the four Geneva Conventions similarly define "grave breaches." Geneva Convention III on POWs defines a grave breach as:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Geneva Convention III, art. 130. As mentioned before, the Geneva Conventions require the High Contracting Parties to enact penal legislation to punish anyone who commits or orders a grave breach. *See, e.g., id.* art. 129. Further, each State party has the obligation to search for and bring to justice (either before its courts or by delivering a suspect to another State party) anyone who commits a grave breach. No State party is permitted to absolve itself or any other nation of liability for committing a grave breach.

Thus, the WCA does not criminalize all breaches of the Geneva Conventions. Failure to follow some of the regulations regarding the treatment of POWs, such as difficulty in meeting all of the conditions set forth for POW camp conditions, does not constitute a grave breach within the meaning of Geneva Convention III, art. 130. Only by causing great suffering or serious bodily injury to POWs, killing or torturing them, depriving them of access to a fair trial, or forcing them to serve in the Armed Forces, could the United States actually commit a grave breach. Similarly, unintentional, isolated collateral damage on civilian targets would not constitute a grave breach within the meaning of Geneva Convention IV, art. 147. Article 147 requires that for a grave breach to have occurred, destruction of property must have been done "wantonly" and without military justification, while the killing or injury of civilians must have been "wilful."

### D. *Common Article 3 of the Geneva Conventions*

Section 2441(c)(3) also defines as a war crime conduct that "constitutes a violation of common Article 3" of the Geneva Conventions. Article 3 is a unique provision that governs the conduct of signatories to the Conventions in a particular kind of conflict that is *not* one between High Contracting Parties to the Conventions. Thus, common Article 3 may require the United States, as a High Contracting Party, to follow certain rules even if other parties to the conflict are not parties to the Conventions. On the other hand, Article 3 requires state parties to follow only certain minimum standards of treatment toward prisoners, civilians, or the sick and wounded, rather than the Conventions as a whole.

Common Article 3 reads in relevant part as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. . . .

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Common article 3 complements common Article 2. Article 2 applies to cases of declared war or of any other armed conflict that may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[10] Common Article 3, however, covers "armed conflict not of an international character" – a war that does not involve cross-border attacks – that occurs within the territory of one of the High Contracting Parties. There is substantial reason to think that this language refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its own territory.

To begin with, Article 3's text strongly supports the interpretation that it applies to large-scale conflicts between a State and an insurgent group. First, the language at the end of Article 3 states that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict." This provision was designed to ensure that a Party that observed Article 3 during a civil war would not be understood to have granted the "recognition of the insurgents as an adverse party." Frits Kalshoven, *Constraints on the Waging of War* 59 (1987). Second, Article 3 is in terms limited to "armed conflict . . . occurring *in the territory of one of the High Contracting Parties*" (emphasis added). This limitation makes perfect sense if the Article

[10] Article 2's reference to a state of war "not recognized" by a belligerent was apparently intended to refer to conflicts such as the 1937 war between China and Japan. Both sides denied that a state of war existed. *See* Joyce A. C. Gutteridge, *The Geneva Conventions of 1949*, 26 Brit. Y.B. Int'l L. 294, 298-99 (1949).

applies to civil wars, which are fought primarily or solely within the territory of a single state. The limitation makes little sense, however, as applied to a conflict between a State and a transnational terrorist group, which may operate from different territorial bases, some of which might be located in States that are parties to the Conventions and some of which might not be. In such a case, the Conventions would apply to a single armed conflict in some scenes of action but not in others – which seems inexplicable.

This interpretation is supported by commentators. One well-known commentary states that "a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory."[11] A legal scholar writing in the same year in which the Conventions were prepared stated that "a conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . must normally mean a civil war."[12]

Analysis of the background to the adoption of the Geneva Conventions in 1949 confirms our understanding of common Article 3. It appears that the drafters of the Conventions had in mind only the two forms of armed conflict that were regarded as matters of general *international* concern at the time: armed conflict between Nation States (subject to Article 2), and large-scale civil war within a Nation State (subject to Article 3). To understand the context in which the Geneva Conventions were drafted, it will be helpful to identify three distinct phases in the development of the laws of war.

First, the traditional law of war was based on a stark dichotomy between "belligerency" and "insurgency." The category of "belligerency" applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the category of "insurgency" applied to armed violence breaking out within the territory of a sovereign State.[13] Correspondingly, international law treated the two classes of conflict in different ways. Inter-state wars were regulated by a body of international legal rules governing both the conduct of hostilities and the protection of noncombatants. By contrast, there were very few international rules governing civil unrest, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law, which precluded any possible intrusion by other States.[14] This was a "clearly sovereignty-oriented" phase of international law.[15]

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[11] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at ¶ 4339 (Yves Sandoz et al. eds., 1987)

[12] Gutteridge, *supra* n.10, at 300.

[13] *See* Joseph H. Beale, Jr., *The Recognition of Cuban Belligerency*, 9 Harv. L. Rev. 406, 406 n.1 (1896).

[14] *See The Prosecutor v. Dusko Tadic (Jurisdiction of the Tribunal)*, (Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia 1995) (the "ICTY"), 105 I.L.R. 453, 504-05 (E. Lauterpacht and C.J. Greenwood eds., 1997).

[15] *Id.* at 505; *see also* Gerald Irving Draper, *Reflections on Law and Armed Conflicts* 107 (1998) ("Before 1949, in the absence of recognized belligerency accorded to the elements opposed to the government of a State, the law of war . . . had no application to internal armed conflicts. . . . International law had little or nothing to say as to how the armed rebellion was crushed by the government concerned, for such matters fell within the domestic jurisdiction of States. Such conflicts were often waged with great lack of restraint and cruelty. Such conduct was a domestic matter.").

The second phase began as early as the Spanish Civil War (1936-39) and extended through the time of the drafting of the Geneva Conventions until relatively recently. During this period, State practice began to apply certain general principles of humanitarian law beyond the traditional field of State-to-State conflict to "those internal conflicts that constituted large-scale civil wars."[16] In addition to the Spanish Civil War, events in 1947 during the Civil War between the Communists and the Nationalist régime in China illustrated this new tendency.[17] Common Article 3, which was prepared during this second phase, was apparently addressed to armed conflicts akin to the Chinese and Spanish civil wars. As one commentator has described it, Article 3 was designed to restrain governments "in the handling of armed violence directed against them for the express purpose of secession or at securing a change in the government of a State," but even after the adoption of the Conventions it remained "uncertain whether [Article 3] applied to full-scale civil war."[18]

The third phase represents a more complete break than the second with the traditional "State-sovereignty-oriented approach" of international law. This approach gives central place to individual human rights. As a consequence, it blurs the distinction between international and internal armed conflicts, and even that between civil wars and other forms of internal armed conflict. This approach is well illustrated by the ICTY's decision in *Tadic*, which appears to take the view that common Article 3 applies to non-international armed conflicts of *any* description, and is not limited to civil wars between a State and an insurgent group. In this conception, common Article 3 is not just a complement to common Article 2; rather, it is a catch-all that establishes standards for any and all armed conflicts not included in common Article 2.[19]

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[16] *Tadic*, 105 I.L.R. at 507. Indeed, the events of the Spanish Civil War, in which "both the republican Government [of Spain] and third States refused to recognize the [Nationalist] insurgents as belligerents," *id.* at 507, may be reflected in common Article 3's reference to "the legal status of the Parties to the conflict."

[17] *See id.* at 508.

[18] *See* Draper, *Reflections on Law and Armed Conflicts*, *supra*, at 108.

[19] An interpretation of common Article 3 that would apply it to all forms of non-international armed conflict accords better with some recent approaches to international humanitarian law. For example, the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *supra*, after first stating in the text that Article 3 applies when "the government of a single State [is] in conflict with one or more armed factions within its territory," thereafter suggests, in a footnote, that an armed conflict not of an international character "may also exist in which armed factions fight against each other without intervention by the armed forces of the established government." *Id.* ¶ 4339 at n.2. A still broader interpretation appears to be supported by the language of the decision of the International Court of Justice (the "ICJ") in *Nicaragua v. United States* – which, it should be made clear, the United States refused to acknowledge by withdrawing from the compulsory jurisdiction of the ICJ:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied *in the armed conflicts of a non-international character*. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity."

*Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, (International Court of Justice 1986), 76 I.L.R. 1, 448, ¶ 218 (E. Lauterpacht and C.J. Greenwood eds., 1988) (emphasis added). The ICJ's language is probably best read to suggest that all "armed conflicts" are either international or non-international, and that if they are non-international, they are governed by common Article 3. If that is the correct understanding of the quoted language, however, it should be noted that the result was merely stated as a conclusion, without taking account either of the precise language of Article 3 or of the background to its adoption. Moreover, while it was true

Nonetheless, despite this recent trend, we think that such an interpretation of common Article 3 fails to take into account, not only the language of the provision, but also its historical context. First, as we have described above, such a reading is inconsistent with the text of Article 3 itself, which applies only to "armed conflict not of an international character occurring in the territory of one of the High Contacting Parties." In conjunction with common Article 2, the text of Article 3 simply does not reach international conflicts where one of the parties is not a Nation State. If we were to read the Geneva Conventions as applying to all forms of armed conflict, we would expect the High Contracting Parties to have used broader language, which they easily could have done. To interpret common Article 3 by expanding its scope well beyond the meaning borne by the text is effectively to amend the Geneva Conventions without the approval of the State Parties to the agreements.

Second, as we have discussed, Article 3 was prepared during a period in which the traditional, State-centered view of international law was still dominant and was only just beginning to give way to a human-rights-based approach. Giving due weight to the State practice and doctrinal understanding of the time, it seems to us overwhelmingly likely that an armed conflict between a Nation State and a transnational terrorist organization, or between a Nation State and a failed State harboring and supporting a transnational terrorist organization, could not have been within the contemplation of the drafters of common Article 3. These would have been simply unforeseen and, therefore, not provided for. Indeed, it seems to have been uncertain even a decade after the Conventions were signed whether common Article 3 applied to armed conflicts that were neither international in character nor civil wars but anti-colonialist wars of independence such as those in Algeria and Kenya. *See* Gerald Irving Draper, *The Red Cross Conventions* 15 (1957). Further, it is telling that in order to address this unforeseen circumstance, the State Parties to the Geneva Conventions did not attempt to distort the terms of common Article 3 to apply it to cases that did not fit within its terms. Instead, they drafted two new protocols (neither of which the United States has ratified) to adapt the Conventions to the conditions of contemporary hostilities.[20] Accordingly, common Article 3 is best understood not to apply to such armed conflicts.

Third, it appears that in enacting the WCA, Congress did not understand the scope of Article 3 to extend beyond civil wars to all other types of internal armed conflict. As discussed in our review of the legislative history, when extending the WCA to cover violations of common Article 3, the House apparently understood that it was codifying treaty provisions that "forbid atrocities occurring in both civil wars and wars between nations."[21] If Congress had embraced a much broader view of common Article 3, and hence of 18 U.S.C. § 2441, we would expect both

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that one of the conflicts to which the ICJ was addressing itself – "[t]he conflict between the *contras*' forces and those of the Government of Nicaragua" – "was an armed conflict which is 'not of an international character,'" *id.* at 448, ¶ 219, that conflict was recognizably a civil war between a State and an insurgent group, not a conflict between or among violent factions in a territory in which the State had collapsed. Thus there is substantial reason to question the logic and scope of the ICJ's interpretation of common Article 3.

[20] See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 4; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 610.

[21] 143 Cong. Rec. H5865-66 (daily ed. July 28, 1997) (remarks of Rep. Jenkins).

January 19, 2002

From: Secretary of Defense Donald Rumsfeld
To: Chairman of the Joints Chiefs of Staff

RE : "Status of Taliban and Al Qaidq; Determines are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949.

~~SECRET~~ UNCLASSIFIED

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JAN 19 2002

MEMORANDUM FOR CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Status of Taliban and Al Qaida

(U) Transmit the following to the Combatant Commanders:

(U)
(S) The United States has determined that Al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949.

(U) The Combatant Commanders shall, in detaining Al Qaida and Taliban individuals under the control of the Department of Defense, treat them humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949.

(U) The Combatant Commanders shall transmit this order to subordinate commanders, including Commander, Joint Task Force 160, for implementation.

(U) Keep me appropriately informed of the implementation of this order.

383.6

14 Jan 02

Classified by: SecDef
Reason: 1.5(d)
Declassify on: 01/19/12

DECLASSIFIED ON 4 FEB 2002
PER DOD GENERAL COUNCIL MEMO
Please Notify All Recipients to downgrade this Memorandum to Unclassified

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Date 18 JUN 2004
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MSGID/GENADMIN/CJCS//
REF/A/DOC/SECDEF/19JAN02/NOTAL/-//
AMPN/REF A IS 19 JAN 02 SECDEF MEMO TO CJCS REGARDING THE STATUS OF TALIBAN AND AL QAIDA DETAINEES.//
SUBJ/(U) STATUS OF TALIBAN AND AL QAIDA//
RMKS/(U) 1. SECDEF MEMO OF 19 JAN 02 (REF A) IS RESTATED BELOW FOR YOUR INFORMATION.
(U) 2. THE UNITED STATES HAS DETERMINED THAT AL QAIDA AND TALIBAN INDIVIDUALS UNDER THE CONTROL OF THE DEPARTMENT OF DEFENSE ARE NOT ENTITLED TO PRISONER OF WAR STATUS FOR PURPOSES OF THE GENEVA CONVENTIONS OF 1949.
(U) 3. THE COMBATANT COMMANDERS SHALL, IN DETAINING AL QAIDA AND TALIBAN INDIVIDUALS UNDER THE CONTROL OF THE DEPARTMENT OF DEFENSE, TREAT THEM HUMANELY AND TO THE EXTENT APPROPRIATE AND CONSISTENT WITH MILITARY NECESSITY IN A MANNER CONSISTENT WITH THE PRINCIPLES OF THE GENEVA CONVENTIONS OF 1949.
(U) 4. THE COMBATANT COMMANDERS SHALL TRANSMIT THIS ORDER TO SUBORDINATE COMMANDERS INCLUDING COMMANDER, JOINT TASK FORCE 160,

January 21, 2002

Message from the Chairman, of the Joint Chiefs of Staff
To: Unified Commands and Services

Re, "Status of Taliban and Al Qaida"

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PAGE 03 RUEKJCS7350 [redacted]
FOR IMPLEMENTATION.
(U) 5. KEEP ME APPROPRIATELY INFORMED OF THE IMPLEMENTATION OF THIS ORDER.//
DECL/CLBY: G.S NEWBOLD, LTGEN, USMC; RES: 1.5 (A); DECLON: X4//
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January 22, 2002 Department of Justice memo to White House and Defense Department Counsels regarding the application of the War Crimes Act and the Geneva Conventions to prisoners from the Afghanistan conflict.

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U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 22, 2002

**Memorandum for Alberto R. Gonzales**
**Counsel to the President,**
**and William J. Haynes II**
**General Counsel of the Department of Defense**

*Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees*

You have asked for our Office's views concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan. In particular, you have asked whether certain treaties forming part of the laws of armed conflict apply to the conditions of detention and the procedures for trial of members of al Qaeda and the Taliban militia. We conclude that these treaties do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that that President has sufficient grounds to find that these treaties do not protect members of the Taliban militia. This memorandum expresses no view as to whether the President should decide, as a matter of policy, that the U.S. Armed Forces should adhere to the standards of conduct in those treaties with respect to the treatment of prisoners.

We believe it most useful to structure the analysis of these questions by focusing on the War Crimes Act, 18 U.S.C. § 2441 (Supp. III 1997) ("WCA"). The WCA directly incorporates several provisions of international treaties governing the laws of war into the federal criminal code. Part I of this memorandum describes the WCA and the most relevant treaty that it incorporates: the Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III").[1]

Parts II and III of this memorandum discuss why other deviations from the text of Geneva III would not present either a violation of the treaty or of the WCA. Part II explains that al Qaeda detainees cannot claim the protections of Geneva III because the treaty does not apply to them. Al Qaeda is merely a violent political movement or organization and not a nation-State. As a result, it cannot be a state party to any treaty. Because of the novel nature of this conflict, moreover, a conflict with al Qaeda is not properly included in non-international forms of armed

[1] The four Geneva Conventions for the Protection of Victims of War, dated August 12, 1949, were ratified by the United States on July 14, 1955. These are the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3115 ("Geneva Convention I"); the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3219 ("Geneva Convention II"); the Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3517 ("Geneva Convention III"); and the Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3317 ("Geneva Convention IV").

conflict to which some provisions of the Geneva Conventions might apply. Therefore, neither the Geneva Conventions nor the WCA regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict.

Part III discusses why the President may decide that Geneva III, as a whole, does not protect members of the Taliban militia in the current situation. The President has the constitutional authority to temporarily suspend our treaty obligations to Afghanistan under the Geneva Conventions. Although he may exercise this aspect of the treaty power at his discretion, we outline several grounds upon which he could justify that action here. In particular, he may determine that Afghanistan was not a functioning State, and therefore that the Taliban militia was not a government, during the period in which the Taliban was engaged in hostilities against the United States and its allies. Afghanistan's status as a failed State is sufficient ground alone for the President to suspend Geneva III, and thus to deprive members of the Taliban militia of POW status. The President's constitutional power to suspend performance of our treaty obligations with respect to Afghanistan is not restricted by international law. It encompasses the power to suspend some treaties but not others, or some but not all obligations under a particular treaty. Should the President make such a determination, then Geneva III would not apply to Taliban prisoners and any failure to meet that treaty's requirements would not violate either our treaty obligations or the WCA.

Part IV examines justifications for any departures from Geneva III requirements should the President decline to suspend our treaty obligations toward Afghanistan. It explains that certain deviations from the text of Geneva III may be permissible, as a matter of domestic law, if they fall within certain justifications or legal exceptions, such as those for self-defense or infeasibility. Further, Part IV discusses the President's authority to find, even if Geneva III were to apply, that Taliban members do not qualify as POWs as defined by the treaty.

In Part V, we address the question whether, in the absence of any Geneva III obligations, customary international law requires, as a matter of federal law, that the President provide certain standards of treatment for al Qaeda or Taliban prisoners. We conclude that customary international law, as a matter of domestic law, does not bind the President, or restrict the actions of the United States military, because it does not constitute either federal law made in pursuance of the Constitution or a treaty recognized under the Supremacy Clause.

## I. *Background and Overview of the War Crimes Act and the Geneva Conventions*

It is our understanding that your Department is considering two basic plans regarding the treatment of members of al Qaeda and the Taliban militia detained during the Afghanistan conflict. First, the Defense Department intends to make available a facility at the U.S. Navy base at Guantanamo Bay, Cuba ("GTMO"), for the long-term detention of these individuals, who have come under our control either through capture by our military or transfer from our allies in Afghanistan. At the present moment, your Department has confined these individuals in temporary facilities, pending the construction of a more permanent camp at GTMO. While it is conceivable that some might argue that these facilities are not fully in keeping with the terms of Geneva III, we understand that they meet minimal humanitarian requirements consistent with the need to prevent violence and for force protection. We understand that GTMO authorities are

providing these individuals with regular food and medical care, and that basic hygiene and sanitary standards are being maintained. You have further informed us that your plans for a longer-term facility at GTMO are still under development.[2]

Second, your Department is developing procedures to implement the President's Military Order of November 13, 2001, which establishes military commissions for the trial of violations of the laws of war committed by non-U.S. citizens.[3] The question has arisen whether Geneva III would restrict the proposed rules, or even require that only courts-martial be used to try members of al Qaeda or the Taliban militia for war crimes.

We believe that the WCA provides a useful starting point for our analysis of the application of the Geneva Conventions to the treatment of detainees captured in the Afghanistan theater of operations.[4] Section 2441 of title 18 renders certain acts punishable as "war crimes." The statute's definition of that term incorporates, by reference, certain treaties or treaty provisions relating to the laws of war, including the Geneva Conventions.

## A. *Section 2441: An Overview*

Section 2441 of Title 18 lists four categories of war crimes. First, it criminalizes "grave breaches" of the Geneva Conventions, which are defined by treaty and will be discussed below. Second, it makes illegal conduct prohibited by articles 23, 25, 27 and 28 of the Annex to the Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 ("Hague Convention IV"). Third, it criminalizes violations of what is known as "commonarticle 3," which is a provision common to all four of the Geneva Conventions. Fourth, it criminalizes conduct prohibited by certain other laws of war treaties, once the United States joins them. A House Report states that the original legislation "carries out the international obligations of the United States under the Geneva Conventions of 1949 to provide criminal penalties for certain war crimes." H.R. Rep. No. 104-698, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2166. Each of those four conventions includes a clause relating to legislative implementation and to criminal punishment.[5]

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[2] We have discussed in a separate memorandum the federal jurisdiction issues that might arise concerning Guantanamo Bay. *See* Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Patrick F. Philbin, Deputy Assistant Attorney General and John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001).

[3] *See generally* Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001).

[4] The rule of lenity requires that the WCA be read so as to ensure that prospective defendants have adequate notice of the nature of the acts that the statute condemns. *See, e.g., Castillo v. United States*, 530 U.S. 120, 131 (2000). In those cases in which the application of a treaty incorporated by the WCA is unclear, therefore, the rule of lenity requires that the interpretive issue be resolved in the defendant's favor.

[5] That common clause reads as follows:

> The [signatory Nations] undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention. . . . Each [signatory nation] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. . . . It may also, if it prefers,. . . hand such persons over for trial to another [signatory nation], provided such [nation] has made out a *prima facie* case.

In enacting section 2441, Congress sought to fill certain perceived gaps in the coverage of federal criminal law. The main gaps were thought to be of two kinds: subject matter jurisdiction and personal jurisdiction. First, Congress found that "[t]here are major gaps in the prosecutability of individuals under federal criminal law for war crimes committed against Americans."[6] For example, "the simple killing of a[n American] prisoner of war" was not covered by any existing Federal statute.[7] Second, Congress found that "[t]he ability to court martial members of our armed services who commit war crimes ends when they leave military service. [Section 2441] would allow for prosecution even after discharge."[8] Congress considered it important to fill this gap, not only in the interest of the victims of war crimes, but also of the accused. "The Americans prosecuted would have available all the procedural protections of the American justice system. These might be lacking if the United States extradited the individuals to their victims' home countries for prosecution."[9] Accordingly, section 2441 criminalizes forms of conduct in which a U.S. national or a member of the Armed Forces may be either a victim or a perpetrator.

B. *Grave Breaches of the Geneva Conventions*

The Geneva Conventions of 1949 remain the agreements to which more States have become parties than any other concerning the laws of war. Convention I deals with the treatment of wounded and sick in armed forces in the field; Convention II addresses treatment of the wounded, sick, and shipwrecked in armed forces at sea; Convention III regulates treatment of POWs; Convention IV addresses the treatment of citizens.

The Geneva Conventions, like treaties generally, structure legal relationships between nation-States, not between nation-States and private, transnational or subnational groups or organizations.[10] Article 2, which is common to all four Geneva Conventions, makes the

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Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

[6] H.R. Rep. No. 104-698, at 6, *reprinted in* 1996 U.S.C.C.A.N. at 2171.

[7] *Id.* at 5, *reprinted in* 1996 U.S.C.C.A.N. at 2170. In projecting our criminal law extraterritorially in order to protect victims who are United States nationals, Congress was apparently relying on the international law principle of passive personality. The passive personality principle "'asserts that a state may apply law – particularly criminal law – to an act committed outside its territory by a person not its national where the victim of the act was its national.'" *United States v. Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir.), *cert. denied*, 525 U.S. 834 (1998). The principle marks recognition of the fact that "each nation has a legitimate interest that its nationals and permanent inhabitants not be maimed or disabled from self-support," or otherwise injured. *Lauritzen v. Larsen*, 345 U.S. 571, 586 (1953); *see also Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970).

[8] H.R. Rep. No. 104-698, at 7, *reprinted in* 1996 U.S.C.C.A.N. at 2172. In *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Supreme Court had held that a former serviceman could not constitutionally be tried before a court martial under the Uniform Code for Military Justice (the "UCMJ") for crimes he was alleged to have committed while in the armed services. The WCA cured this problem.

[9] H.R. Rep. No. 104-698, at 7, *reprinted in* 1996 U.S.C.C.A.N. at 2172. The principle of nationality in international law recognizes that (as Congress did here) a State may criminalize acts performed extraterritorially by its own nationals. *See, e.g., Skiriotes v. Florida*, 313 U.S. 69, 73 (1941); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952).

[10] *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) ("A treaty is in the nature of a contract between nations."); *The Head Money Cases*, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact

application of the Conventions to relations between state parties clear. It states that: "the present Convention shall apply to all cases of declared war or of any other armed conflict *which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them."[11] Similarly, it states that "[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

As noted above, Section 2441(c)(1) criminalizes "grave breaches" of the Convention. Each of the four Geneva Conventions has a similar definition of "grave breaches." Geneva Convention III defines a grave breach as:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Geneva Convention III, art. 130. As mentioned before, the Geneva Conventions require the High Contracting Parties to enact penal legislation to punish anyone who commits or orders a grave breach. *See, e.g., id.* art. 129. Further, each State party has the obligation to search for and bring to justice (either before its courts or by delivering a suspect to another State party) anyone who commits a grave breach. No State party is permitted to absolve itself or any other nation of liability for committing a grave breach.

Given the specific definition of "grave breaches," it bears noting that not <u>all</u> breaches of the Geneva Conventions are criminalized under Section 2441. Failure to follow some of the regulations regarding the treatment of POWs, such as difficulty in meeting all of the conditions set forth for POW camp conditions, does not constitute a grave breach within the meaning of Geneva Convention III, art. 130. Only by causing great suffering or serious bodily injury to POWs, killing or torturing them, depriving them of access to a fair trial, or forcing them to serve in the Armed Forces, could the United States actually commit a grave breach.

### *C. Common Article 3 of the Geneva Conventions*

Section 2441(c)(3) also defines as a war crime conduct that "constitutes a violation of common article 3" of the Geneva Conventions. Article 3 is a unique provision that governs the conduct of signatories to the Conventions in a particular kind of conflict that is *not* one between High Contracting Parties to the Conventions. Thus, common article 3 may require the United States, as a High Contracting Party, to follow certain rules even if other parties to the conflict are not parties to the Conventions. On the other hand, article 3 requires State parties to follow only certain minimum standards of treatment toward prisoners, civilians, or the sick and wounded – standards that are much less onerous and less detailed than those spelled out in the Conventions as a whole.[12]

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between independent nations."); *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 167 (3d Cir. 1997) ("[T]reaties are agreements between nations.")

[11] Geneva III art. 2 (emphasis added).

[12] Common Article 3 reads in relevant part as follows:

Common article 3 complements common article 2. Article 2 applies to cases of declared war or of any other armed conflict that may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[13] Common article 3, however, covers "armed conflict not of an international character" – a war that does not involve cross-border attacks – that occurs within the territory of one of the High Contracting Parties.

Common article 3's text provides substantial reason to think that it refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its own territory. First, the text of the provision refers specifically to an armed conflict that a) is not of an international character, and b) occurs in the territory of a state party to the Convention. It does not sweep in all armed conflicts, nor does it address a gap left by common article 2 for international armed conflicts that involve non-state entities (such as an international terrorist organization) as parties to the conflict. Further, common article 3 addresses only non-international conflicts that occur within the territory of a single state party, again, like a civil war. This provision would not reach an armed conflict in which one of the parties operated from multiple bases in several different states. Also, the language at the end of article 3 states that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict." This provision was designed to ensure that a state party that observed article 3 during a civil war would not be understood to have granted the "recognition of the insurgents as an adverse party."[14]

This interpretation is supported by commentators. One well-known commentary states that "a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory."[15] A legal scholar writing in the same year in which the Conventions were prepared

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In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. . . .

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

[13] Article 2's reference to a state of war "not recognized" by a belligerent was apparently intended to refer to conflicts such as the 1937 war between China and Japan. Both sides denied that a state of war existed. *See* Joyce A. C. Gutteridge, *The Geneva Conventions of 1949*, 26 Brit./Y.B. Int'l L. 294, 298-99 (1949).

[14] Frits Kalshoven, *Constraints on the Waging of War* 59 (1987).

[15] *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at ¶ 4459 (Yves Sandoz et al. eds., 1987)

stated that "a conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . must normally mean a civil war."[16]

Analysis of the background to the adoption of the Geneva Conventions in 1949 confirms our understanding of common article 3. It appears that the drafters of the Conventions had in mind only the two forms of armed conflict that were regarded as matters of general *international* concern at the time: armed conflict between nation-States (subject to article 2), and large-scale civil war within a nation-State (subject to article 3). To understand the context in which the Geneva Conventions were drafted, it will be helpful to identify three distinct phases in the development of the laws of war.

First, the traditional laws of war were based on a stark dichotomy between "belligerency" and "insurgency." The category of "belligerency" applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the category of "insurgency" applied to armed violence breaking out within the territory of a sovereign State.[17] International law treated the two classes of conflict in different ways. Inter-state wars were regulated by a body of international legal rules governing both the conduct of hostilities and the protection of noncombatants. By contrast, there were very few international rules governing armed conflict within a state, for states preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law, which precluded any possible intrusion by other States.[18] This was a "clearly sovereignty-oriented" phase of international law.[19]

The second phase began as early as the Spanish Civil War (1936-39) and extended through the time of the drafting of the Geneva Conventions until relatively recently. During this period, State practice began to apply certain general principles of humanitarian law beyond the traditional field of State-to-State conflict to "those internal conflicts that constituted large-scale civil wars."[20] In addition to the Spanish Civil War, events in 1947 during the civil war between the Communists and the Nationalist regime in China illustrated this new tendency.[21] Common article 3, which was prepared during this second phase, was apparently addressed to armed conflicts akin to the Chinese and Spanish civil wars. As one commentator has described it, article 3 was designed to restrain governments "in the handling of armed violence directed against them for the express purpose of secession or at securing a change in the government of a

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[16] Gutteridge, *supra*, at 300.

[17] *See* Joseph H. Beale, Jr., *The Recognition of Cuban Belligerency*, 9 Harv. L. Rev. 406, 406 n.1 (1896).

[18] *See The Prosecutor v. Dusko Tadic (Jurisdiction of the Tribunal)* (Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia 1995) ("*Tadic*"), 105 I.L.R. 453, 504-05 (E. Lauterpacht & C.J. Greenwood eds., 1997).

[19] *Id.* at 505; *see also* Gerald Irving Draper, *Reflections on Law and Armed Conflicts* 107 (1998) ("Before 1949, in the absence of recognized belligerency accorded to the elements opposed to the government of a State, the law of war . . . had no application to internal armed conflicts. . . . International law had little or nothing to say as to how the armed rebellion was crushed by the government concerned, for such matters fell within the domestic jurisdiction of States. Such conflicts were often waged with great lack of restraint and cruelty. Such conduct was a domestic matter.").

[20] *Tadic*, 105 I.L.R. at 507. Indeed, the events of the Spanish Civil War, in which "both the republican Government [of Spain] and third States refused to recognize the [Nationalist] insurgents as belligerents," *id.* at 507, may be reflected in common Article 3's reference to "the legal status of the Parties to the conflict."

[21] *See id.* at 508.

State," but even after the adoption of the Conventions it remained "uncertain whether [Article 3] applied to full-scale civil war."[22]

The third phase represents a more complete break than the second with the traditional "State-sovereignty-oriented approach" of international law. This approach gives central place to individual human rights. As a consequence, it blurs the distinction between international and internal armed conflicts. This approach is well illustrated by the decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic*, which appears to take the view that common article 3 applies to all armed conflicts of *any* description other than those between state parties, and is not limited to internal conflicts between a State and an insurgent group. In this conception, common article 3 is not just a complement to common article 2; rather, it is a catch-all that establishes standards for any and all armed conflicts not included in common article 2.[23]

Such an interpretation of common article 3, however, ignores the text and the context in which it was ratified by the United States. If the state parties had intended the Conventions to apply to <u>all</u> forms of armed conflict, they could have used broader, clearer language. To interpret common article 3 by expanding its scope well beyond the meaning borne by its text is effectively to amend the Geneva Conventions without the approval of the State parties to the agreements. Further, as we have discussed, article 3 was ratified during a period in which the traditional, State-centered view of international law was still dominant and was only just beginning to give way to a human-rights-based approach. Giving due weight to the state practice and doctrinal understanding of the time, the idea of an armed conflict between a nation-State and a transnational terrorist organization (or between a nation-State and a failed State harboring and supporting a transnational terrorist organization) could not have been within the contemplation of the drafters of common article 3. Conflicts of these kinds would have been unforeseen and were not provided for in the Conventions. Further, it is telling that in order to address this unforeseen circumstance, the State parties to the Geneva Conventions did not attempt to distort the terms of

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[22] *See* Draper, *Reflections on Law and Armed Conflicts, supra*, at 108.

[23] Some international law authorities seem to suggest that common Article 3 is better read as applying to all forms of non-international armed conflict. The *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, supra*, after first stating that Article 3 applies when "the government of a single State [is] in conflict with one or more armed factions within its territory," suggests, in a footnote, that an armed conflict not of an international character "may also exist in which armed factions fight against each other without intervention by the armed forces of the established government." *Id.* ¶ 4339 at n.2. A still broader interpretation appears to be supported by the language of the decision of the International Court of Justice (the "ICJ") in *Nicaragua v. United States* – which the United States refused to acknowledge by withdrawing from the compulsory jurisdiction of the ICJ. *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, (International Court of Justice 1986), 76 I.L.R. 1, 448, ¶ 218 (E. Lauterpacht & C.J. Greenwood eds., 1988). The ICJ's decision is probably best read to suggest that all "armed conflicts" are either international or non-international, and that if they are non-international, they are governed by common Article 3. If that is the correct understanding, however, the result was merely stated as a conclusion, without taking account either of the precise language of Article 3 or of the background to its adoption. Moreover, while it was true that one of the conflicts to which the ICJ was addressing itself – "[t]he conflict between the *contras*' forces and those of the Government of Nicaragua" – "was an armed conflict which is 'not of an international character,'" *id.* at 448, ¶ 219, that conflict was recognizably a civil war between a State and an insurgent group, not a conflict between or among violent factions in a territory in which the State had collapsed. Thus there is substantial reason to question the logic and scope of the ICJ's interpretation of common Article 3, which, in any event, is not binding as a matter of domestic law on the United States.

common article 3 to apply it to cases that did not fit within its terms. Instead, they drafted two new protocols to adapt the Conventions to the conditions of contemporary hostilities.[24] The United States has not ratified these protocols, and hence cannot be held to the reading of the Geneva Conventions they promote. Thus, the WCA's prohibition on violations of common article 3 would apply only to internal conflicts between a state party and an insurgent group, rather than to all forms of armed conflict not covered by common article 2.

## II. *Application of WCA and Associated Treaties to al Qaeda*

We conclude that Geneva III does not apply to the al Qaeda terrorist organization. Therefore, neither the detention nor trial of al Qaeda fighters is subject to Geneva III (or the WCA). Three reasons, examined in detail below, support this conclusion. First, al Qaeda is not a State and thus cannot receive the benefits of a State party to the Conventions. Second, al Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under Geneva Convention III. Third, the nature of the conflict precludes application of common article 3 of the Geneva Conventions.

*Geneva III does not apply to a non-State actor such as the al Qaeda terrorist organization.* Al Qaeda is not a State. It is a non-governmental terrorist organization composed of members from many nations, with ongoing operations in dozens of nations. Non-governmental organizations cannot be parties to any of the international agreements here governing the laws of war. Common article 2, which triggers the Geneva Convention provisions regulating detention conditions and procedures for trial of POWs, is limited to cases of declared war or armed conflict "between two or more of the High Contracting Parties." Al Qaeda is not a High Contracting Party. As a result, the U.S. military's treatment of al Qaeda members is not governed by the bulk of the Geneva Conventions, specifically those provisions concerning POWs. Conduct towards captured members of al Qaeda, therefore, also cannot constitute a violation of 18 U.S.C. § 2441(c)(1).

*Second, al Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under Geneva Convention III.* It might be argued that, even though it is not a State party to the Geneva Conventions, al Qaeda could be covered by some protections in Geneva Convention III. Article 4(A)(2) of Geneva III defines prisoners of war as including not only captured members of the armed forces of a High Contracting Party, but also irregular forces such as "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements." Article 4(A)(3) also includes as POWs "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." *Id.* art. 4(A)(3). It might be claimed that the broad terms of these provisions could be stretched to cover al Qaeda.

This view would be mistaken. Article 4 does not expand the application of the Convention beyond the circumstances expressly addressed in common articles 2 and 3. Unless

[24] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 4; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 610.

there is a conflict subject to article 2, article 4 simply does not apply. If the conflict is one to which article 3 applies, then article 4 has no role because article 3 does not trigger application of the rest of the provisions of Geneva III. Rather, article 3 provides an alternative set of standards that requires only minimal humanitarian protections. As we have explained, the conflict with al Qaeda does not fall within article 2. As a result, article 4 has no application. In other words, article 4 cannot be read as an alternative, and a far more expansive, statement of the application of the Convention. It merely specifies, where there is a conflict covered by article 2 of the Convention, who must be accorded POW status.

Even if article 4, however, were considered somehow to be jurisdictional as well as substantive, captured members of al Qaeda still would not receive the protections accorded to POWs. First, al Qaeda is not the "armed forces," volunteer forces, or militia of a state party that is a party to the conflict, as defined in article 4(A)(1). Second, they cannot qualify as volunteer force, militia, or organized resistance force under article 4(A)(2). That article requires that militia or volunteers fulfill four conditions: command by responsible individuals, wearing insignia, carrying arms openly, and obeying the laws of war. Al Qaeda members have clearly demonstrated that they will not follow these basic requirements of lawful warfare. They have attacked purely civilian targets of no military value; they refused to wear uniform or insignia or carry arms openly, but instead hijacked civilian airliners, took hostages, and killed them; and they themselves do not obey the laws of war concerning the protection of the lives of civilians or the means of legitimate combat. As these requirements also apply to any regular armed force under other treaties governing the laws of armed conflict,[25] al Qaeda members would not qualify under article 4(A)(3) either, which provides POW status to captured individuals who are members of a "regular armed force" that professes allegiance to a government or authority not recognized by the detaining power. Members of al Qaeda, therefore, would not qualify for POW treatment under article 4, even if it were somehow thought that they were participating in a conflict covered by common article 2 or if article 4 itself were thought to be jurisdictional in nature.

*Third, the nature of the conflict precludes application of common article 3 of the Geneva Conventions.* As discussed in Part I, the text of common article 3, when read in harmony with common article 2, shows that the Geneva Conventions were intended to cover either: a) traditional wars between state parties to the Conventions (article 2), b) or non-international civil wars (article 3). Our conflict with al Qaeda does not fit into either category. It is not an international war between nation-States because al Qaeda is not a State. Nor is this conflict a civil war under article 3, because it *is* a conflict of "an international character." Al Qaeda operates in many countries and carried out a massive international attack on the United States on September 11, 2001. Therefore, the military's treatment of al Qaeda members is not limited either by common article 3 or 18 U.S.C. § 2441(c)(3).

## III. *Application of the Geneva Conventions to the Taliban Militia*

Whether the Geneva Conventions apply to the detention and trial of members of the Taliban militia presents a more difficult legal question. Afghanistan has been a party to all four Geneva Conventions since September 1956. Some might argue that this requires application of the

[25] Hague Convention IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

Geneva Conventions to the present conflict with respect to the Taliban militia, which would then trigger the WCA. Nonetheless, we conclude that the President has more than ample grounds to find that our treaty obligations under Geneva III toward Afghanistan were suspended during the period of the conflict. Under Article II of the Constitution, the President has the unilateral power to suspend whole treaties or parts of them at his discretion. In this part, we describe the President's constitutional power and discuss the grounds upon which he can justify the exercise of that power.

There are several grounds which mightthe President could exercise that authority here. First, the weight of informed opinion indicates that, for the period in question, Afghanistan was a "failed State" whose territory had been largely held by a violent militia or faction rather than by a government. As a failed state, Afghanistan did not have an operating government nor was it capable of fulfilling its international obligations. Therefore, the United States could decide to partially suspend any obligations that the United States might have under Geneva III towards the Taliban militia. Second, there appears to be developing evidence that the Taliban leadership had become closely intertwined with, if not utterly dependent upon, al Qaeda. This would have rendered the Taliban more akin to a terrorist organization that used force not to administer a government, but for terrorist purposes. The President could decide that no treaty obligations were owed to such a force.

### A. *Constitutional Authority*

Article II of the Constitution makes clear that the President is vested with all of the federal executive power, that he "shall be Commander in Chief," that he shall appoint, with the advice and consent of the Senate, and receive, ambassadors, and that he "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const. art. II, § 2, cl. 2. Congress possesses its own specific foreign affairs powers, primarily those of declaring war, raising and funding the military, and regulating international commerce. While Article II, section 1 of the Constitution grants the President an undefined executive power, Article I, section 1 limits Congress to "[a]ll legislative Powers herein granted" in the rest of Article I.

From the very beginnings of the Republic, this constitutional arrangement has been understood to grant the President plenary control over the conduct of foreign relations. As Secretary of State Thomas Jefferson observed during the first Washington administration: "The constitution has divided the powers of government into three branches [and] . . . has declared that 'the executive powers shall be vested in the President,' submitting only special articles of it to a negative by the senate."[26] Due to this structure, Jefferson continued, "[t]he transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly."[27] In defending President Washington's authority to issue the Neutrality Proclamation, Alexander Hamilton came to the same interpretation of the President's foreign affairs powers. According to Hamilton, Article II "ought . . . to be considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive

[26] Thomas Jefferson, *Opinion on the Powers of the Senate Respecting Diplomatic Appointments* (1790), *reprinted in* 16 *The Papers of Thomas Jefferson* 378 (Julian P. Boyd ed., 1961).
[27] *Id.* at 379.

Power; leaving the rest to flow from the general grant of that power."[28] As future Chief Justice John Marshall famously declared a few years later, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . The [executive] department . . . is entrusted with the whole foreign intercourse of the nation. . . ."[29]

On the few occasions where it has addressed the question, the Supreme Court has lent its approval to the executive branch's broad powers in the field of foreign affairs. Responsibility for the conduct of foreign affairs and for protecting the national security are, as the Supreme Court has observed, "'central Presidential domains.'"[30] The President's constitutional primacy flows from both his unique position in the constitutional structure and from the specific grants of authority in Article II making the President the Chief Executive of the Nation and the Commander in Chief.[31] Due to the President's constitutionally superior position, the Supreme Court has consistently "recognized 'the generally accepted view that foreign policy [is] the province and responsibility of the Executive.'"[32] This foreign affairs power is independent of Congress: it is "the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress."[33]

In light of these principles, any unenumerated executive power, especially one relating to foreign affairs, must be construed as within the control of the President. Although the Constitution does not specifically mention the power to suspend or terminate treaties, these authorities have been understood by the courts and long executive branch practice as belonging solely to the President. The treaty power is fundamentally an executive power established in Article II of the Constitution, and power over treaty matters post-ratification are within the President's plenary authority. As Alexander Hamilton declared during the controversy over the Neutrality Proclamation, "though treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone."[34] Commentators also have supported this view. According to the drafters of the *Restatement (Third) of the Foreign Relations Law of the United States*, the President has the power either "to suspend or terminate an [international] agreement in accordance with its terms," or "to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States."[35] Indeed, the President's power to terminate treaties, which has been accepted by practice and considered opinion of the three branches,[36] must include the lesser power of temporarily suspending them. We have discussed these questions in detail in recent opinions, and we follow their analysis here.[37]

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[28] Alexander Hamilton, *Pacificus* No. 1 (1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 39 (Harold C. Syrett et al. eds., 1969).

[29] 10 Annals of Cong. 613-14 (1800).

[30] *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982).

[31] *Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982).

[32] *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)).

[33] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

[34] Hamilton, *Pacificus* No. 1, *supra*, at 42.

[35] *Restatement (Third) of the Foreign Relations Law of the United States* § 339 (1987).

[36] *See, e.g.*, Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, *Re: Authority of the President to Denounce the ABM Treaty* (Dec. 14, 2001); *Goldwater v. Carter*, 617

The courts have often acknowledged the President's constitutional powers with respect to treaties. Thus, it has long been accepted that the President may determine whether a treaty has lapsed because a foreign State has gained or lost its independence, or because it has undergone other changes in sovereignty.[38] Nonperformance of a particular treaty obligation may, in the President's judgment, justify a decision to suspend or terminate the treaty.[39] While Presidents have unrestricted discretion, as a matter of domestic law, in suspending treaties, they can base the exercise of this discretion on several grounds. For example, the President may determine that "the conditions essential to [the treaty's] continued effectiveness no longer pertain."[40] He can decide to suspend treaty obligations because of a fundamental change in circumstances, as the United States did in 1941 in response to hostilities in Europe.[41] The President may also determine that a material breach of a treaty by a foreign government has rendered a treaty not in effect as to that government.[42]

Exercising this constitutional authority, the President can decide to suspend temporarily our obligations under Geneva III toward Afghanistan. Other Presidents have partially suspended treaties, and have suspended the obligations of multilateral agreements with regard to one of the state parties.[43] The President could also determine that relations under the Geneva Conventions

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F.2d 697, 706-07 (D.C. Cir.) (en banc), *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979); Senate Comm. on Foreign Relations, 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* 201 (Comm. Print 2001) (prepared by Congressional Research Service, Library of Congress) (footnotes omitted)

[37] *See* Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001); *see also* Memorandum for William Howard Taft, IV, Legal Adviser, Department of State, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: President's Constitutional Authority to Withdraw Treaties from the Senate* (Aug. 24, 2001).

[38] *See Kennett v. Chambers*, 55 U.S. 38, 47-48, 51 (1852); *Terlinden v. Ames*, 184 U.S. 270, 288 (1902); *Saroop v. Garcia*, 109 F.3d 165, 171 (3d. Cir. 1997) (collecting cases). Alexander Hamilton argued in 1793 that the revolution in France had triggered the power (indeed, the duty) of the President to determine whether the pre-existing treaty of alliance with the King of France remained in effect. The President's constitutional powers, he said, "include[] that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to be recognised or not: And where a treaty antecedently exists between the UStates and such nation that right involves the power of giving operation or not to such treaty." Alexander Hamilton, *Pacificus* No. 1 (1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 41 (Harold C. Syrett et al. eds 1969).

[39] *See Taylor v. Morton*, 23 F. Cas. 784, 787 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, Circuit Justice), *aff'd*, 67 U.S. (2 Black) 481 (1862).

[40] *See International Load Line Convention*, 40 Op. Att'y Gen. 119,124 (1941). Changed conditions have provided a basis on which Presidents have suspended treaties in the past. For example, in 1939, President Franklin Roosevelt suspended the operation of the London Naval Treaty of 1936. "The war in Europe had caused several contracting parties to suspend the treaty, for the obvious reason that it was impossible to limit naval armaments. The notice of termination was therefore grounded on changed circumstances." David Gray Adler, *The Constitution and the Termination of Treaties* 187 (1986).

[41] *International Load Line Convention*, 40 Op. Att'y Gen. at 123.

[42] *See, e.g., Charlton v. Kelly*, 229 U.S. 447, 473 (1913); *Escobedo v. United States*, 623 F.2d 1098, 1106 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980).

[43] In 1986, the United States suspended the performance of its obligations under the Security Treaty (ANZUS Pact), T.I.A.S. 2493, 3 U.S.T. 3420, *entered into force* April 29, 1952, as to New Zealand but not as to Australia. *See* Marian Nash (Leich), 1 *Cumulative Digest of United States Practice in International Law 1981-1988*, at 1279-81.

with Afghanistan should be restored once an Afghan government that is willing and able to execute the country's treaty obligations is securely established.[44] A decision to regard the Geneva Conventions as suspended would not constitute a "denunciation" of the Conventions, for which procedures are prescribed in the Conventions.[45] The President need not regard the Conventions as suspended in their entirety, but only in part.[46]

Among the grounds upon which a President may justify his power to suspend treaties is the collapse of a treaty partner, in other words the development of a failed state that could not fulfill its international obligations and was not under the control of any government. This has been implicitly recognized by the Supreme Court. In *Clark v. Allen*, 331 U.S. 503 (1947), the Supreme Court considered whether a 1923 treaty with Germany continued to exist after the defeat, occupation and partition of Germany by the victorious World War II Allies. The Court rejected the argument that the treaty "must be held to have failed to survive the [Second World War], since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community."[47] Instead, the Court held that "the question whether a state is in a position to perform its treaty obligations is essentially a political question. *Terlinden v. Ames*, 184 U.S. 270, 288 [(1902)]. We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligations of either party in respect to them."[48] In *Clark*, the Court also made clear that the President could consider whether Germany was able to perform its international obligations in deciding whether to suspend our treaty relationship with her.

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Thus, suspension of the Geneva Conventions as to Afghanistan would not affect the United States' relationships under the Conventions with other state parties.

[44] On June 20, 1876, for example, President Grant informed Congress that he was suspending the extradition clause of the 1842 "Webster-Ashburton Treaty" with Great Britain, Convention as to Boundaries, Suppression of Slave Trade and Extradition, Aug. 9, 1842, U.S.-Gr. Brit., Art 10, 8 Stat. 572, 579. Grant advised Congress that the release of two fugitives whose extradition was sought by the United States amounted to the abrogation or annulment of the extradition clause, and that the executive branch in response would take no action to surrender fugitives sought by the British Government unless Congress signified that it do so. The clause remained suspended until it was reactivated by the British Government's resumed performance.

[45] *See, e.g.*, Geneva Convention III, art. 142. The suspension of a treaty is distinct from the denunciation or termination of one. Suspension is generally a milder measure than termination, often being partial, temporary, or contingent upon circumstances that can be altered by the actions of the parties to the treaty. Moreover, at least in the United States, suspension of a treaty can be reversed by unilateral executive action, whereas termination, which annuls a treaty, and which is therefore more disruptive of international relationships, would require Senate consent to a new treaty to be undone.

[46] In general, the partial suspension of the provisions of a treaty (as distinct from both termination and complete suspension) is recognized as permissible under international law. Article 60 of the Vienna Convention on treaties explicitly permits the suspension of a treaty "in whole or in part." "[U]nder both treaty law and non-forcible reprisal law as a basis for responsive suspension it is clear that suspension may be only partial and need not suspend or terminate an agreement as a whole, in contrast, for example, with treaty withdrawal clauses." John Norton Moore, *Enhancing Compliance With International Law: A Neglected Remedy*, 39 Va. J. Int'l L. 881, 932 (1999). It should be noted, however, that the United States is not a party to the Vienna Convention on treaties, although it has treated its rules as customary international law. This issue is explored in greater detail, *infra* Part III.C.

[47] 331 U.S. at 514.

[48] *Id.*; *see also id.* at 508-09 (President might have "formulated a national policy quite inconsistent with the enforcement" of the treaty).

*Clark* demonstrates the Supreme Court's sanction for the President's constitutional authority to decide the "political question" whether our treaty with Germany was suspended because Germany was not in a position to perform its international obligations. Equally here, the executive branch could conclude that Afghanistan was not "in a position to perform its treaty obligations" because it lacked, at least throughout the Taliban's ascendancy, a functioning central government and other essential attributes of statehood. Based on such facts, the President would have the ground to decide that the Nation's Geneva III obligations were suspended as to Afghanistan. The President could further decide that these obligations are suspended until Afghanistan became a functioning state that is in a position to perform its Convention duties. The federal courts would not review such political questions, but instead would defer to the decision of the President.

### B. *Status as a Failed State*

There are ample grounds for the President to determine that Afghanistan was a failed State, and on that basis to suspend performance of our Geneva III obligations towards it.[49] Indeed, the findings of the State and Defense Departments, of foreign leaders, and of expert opinion support the conclusion that Afghanistan under the Taliban was without a functioning central government. The collapse of functioning political institutions in Afghanistan is a valid justification for the exercise of the President's authority to suspend our treaty obligations towards that country.

Such a determination would amount to finding that Afghanistan was a "failed state." A "failed State" is generally characterized by the collapse or near-collapse of State authority. Such a collapse is marked by the inability of central authorities to maintain government institutions, ensure law and order or engage in normal dealings with other governments, and by the prevalence of violence that destabilizes civil society and the economy.

An initial approach to the question whether Afghanistan was a failed state is to examine some of the traditional indicia of statehood.[50] A State has failed when centralized governmental authority has almost completely collapsed, no central authorities are capable of maintaining government institutions or ensuring law and order, and violence has destabilized civil society and

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[49] We should not be understood to be saying that the President's basis for suspending the Geneva Conventions as to Afghanistan is merely the fact that Afghanistan underwent a change of government in 1996, after the military successes of Taliban. The general rule of international law is that treaty relations survive a change of government. *See, e.g.*, 2 Marjorie M. Whiteman, *Digest of International Law* 771-73 (1963); J.L. Briefly, *The Law of Nations* 144-45 (6th ed. 1963); Eleanor C. McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 Am. J. Int'l L. 337 (1977). The general rule is that treaties may still be observed even as to State parties, the current governments of which have been unrecognized. *See New York Chinese TV Programs v. U.E. Enterprises*, 954 F.2d 847 (2d Cir. 1992); *see also Restatement (Third) of the Foreign Relations Law of the United States* § 202 cmts. a, b (1987).

[50] It would be mistaken to argue that the concept of a failed State is not legal in nature, and thus cannot be taken into account in determining whether to suspend our Geneva III obligations toward Afghanistan. Legal scholars as well as political scientists have employed the concept for some time. Moreover, even if taken only as a category of political science, the term "failed State" encapsulates a description of structural conditions within a country such as Afghanistan) that are directly relevant to considering whether that country has lapsed for *legal* purposes into a condition of statelessness.

the economy.[51] Borrowing from the *Restatement (Third) of U.S. Foreign Relations Law*, we may conclude that a state has "failed" if it cannot satisfy some or all of the three traditional tests for "statehood" under international law: i) whether the entity has a defined territory and population; ii) whether the territory/population is under the control of its own government; and iii) whether the entity engages in or has the capacity to engage in formal relations with other States.[52] The State Department has restated this formulation by elaborating a four-part test for statehood: i) whether the entity have effective control over a clearly defined territory and population; ii) whether an organized governmental administration of the territory exists; iii) whether the entity has the capacity to act effectively to conduct foreign relations and to fulfill international obligations; iv) whether the international community recognizes the entity.[53]

We want to make clear that this Office does not have access to all of the facts related to the activities of the Taliban militia and al Qaeda in Afghanistan. Nonetheless, the available facts in the public record would support the conclusion that Afghanistan was a failed State – including facts that pre-existed the military reversals suffered by the Taliban militia and the formation of the new transitional government pursuant to the Bonn Agreement. Indeed, there are good reasons to doubt whether *any* of the conditions were met.

First, even before the outset of the conflict with the United States, the Taliban militia did not have effective control over a clearly defined territory and population. It is unclear whether the Taliban militia ever fully controlled most of the territory of Afghanistan. At the time that the United States air strikes began, at least ten percent of the country, and the population within those areas, was governed by the Northern Alliance. Indeed, the facts suggest that Afghanistan was divided between different tribal and warring factions, rather than controlled by any central State. The Taliban militia in essence represented only an ethnically Pashtun movement, a "tribal

[51] "States in which institutions and law and order have totally or partially collapsed under the pressure and amidst the confusion of erupting violence, yet which subsist as a ghostly presence on the world map, are now commonly referred to as 'failed States' or '*États sans gouvernmement.*'" Daniel Thurer, *The Failed State and International Law*, International Review of the Red Cross No. 836 (Dec. 31, 1999), available at http://www.icrc.org/eng/review (visited Jan. 10, 2002). Somewhat different tests have been used for determining whether a State has "failed." First, the most salient characteristic of a "failed State" seems to be the disappearance of a "central government." Yoram Dinstein, *The Thirteenth Waldemar A. Solf Lecture in International Law*, 166 Mil. L. Rev. 93, 103 (2000); *see also id.* ("All that remains is a multiplicity of groups of irregular combatants fighting each other."). Closely related to this test, but perhaps somewhat broader, is the definition of a "failed State" as "a situation where the government is unable to discharge basic governmental functions with respect to its populace and its territory. Consequently, laws are not made, cases are not decided, order is not preserved and societal cohesion deteriorates. Basic services such as medical care, education, infrastructure maintenance, tax collection and other functions and services rendered by central governing authorities cease to exist or exist only in limited areas." Ruth Gordon, *Growing Constitutions*, 1 U. Pa. J. Const. L. 528, 533-34 (1999). Professor Thurer distinguishes three elements (respectively, territorial, political and functional) said to characterize a "failed State": 1) failed States undergo an "implosion rather than an explosion of the structures of power and authority, the disintegration and destructuring of States rather than their dismemberment;" 2) they experience "the total or near total breakdown of structures guaranteeing law and order;" and 3) there are marked by "the absence of bodies capable, on the one hand, of representing the State at the international level and, on the other, of being influenced by the outside world."

[52] *See Restatement (Third) of the Foreign Relations Law of the United States* § 201; *see also* 1933 Montevideo Convention on Rights and Duties of States, art. 1, 49 Stat. 3097, 28 Am. J. Int'l L. Supp. 75 (1934).

[53] Eleanor C. McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 Am. J. Int'l L. 337 (1977).

militia,"[54] that did not command the allegiance of other major ethnic groups in Afghanistan and that was apparently unable to suppress endemic violence in the country. As a prominent writer on the Taliban militia wrote well before the current conflict began, "[e]ven if [the Taliban] were to conquer the north, it would not bring stability, only continuing guerrilla war by the non-Pashtuns, but this time from bases in Central Asia and Iran which would further destabilize the region."[55]

Second, again even before the United States air strikes and the successes of the Northern Alliance, an organized governmental administration did not exist in Afghanistan. One noted expert on the Taliban has concluded that the country had

> ceased to exist as a viable state . . . . The entire Afghan population has been displaced, not once but many times over. The physical destruction of Kabul has turned it into the Dresden of the late twentieth century. . . . There is no semblance of an infrastructure that can sustain society -- even at the lowest common denominator of poverty. . . . The economy is a black hole that is sucking in its neighbors with illicit trade and the smuggling of drugs and weapons, undermining them in the process. . . . Complex relationships of power and authority built up over centuries have broken down completely. No single group or leader has the legitimacy to reunite the country. Rather than a national identity or kinship-tribal-based identities, territorial regional identities have become paramount. . . . [T]he Taliban refuse to define the Afghan state they want to constitute and rule over, largely because they have no idea what they want. The lack of a central authority, state organizations, a methodology for command and control and mechanisms which can reflect some level of popular participation . . . make it impossible for many Afghans to accept the Taliban or for the outside world to recognize a Taliban government. . . . No warlord faction has ever felt itself responsible for the civilian population, but the Taliban are incapable of carrying out even the minimum of developmental work because they believe that Islam will take care of everyone.[56]

Another expert had reached similar conclusions before the outbreak of the conflict:

> Afghanistan today has become a violent society, bereft of political institutions that function correctly and an economy that functions at all. When this is coupled with the destruction of population and the physical infrastructure . . ., it becomes clear that Afghanistan is a country on the edge of collapse, or at least profound transformation. . . . With the Taliban, there are few meaningful governmental structures and little that actually functions.[57]

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[54] Larry P. Goodson, *Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of the Taliban* 46, 115 (2001).
[55] Ahmed Rashid, *Taliban: Militant Islam, Oil & Fundamentalism in Central Asia* 213 (2001).
[56] *Id.* at 207-08, 212-13.
[57] Goodson, *supra*, at 103-04; 115.

The State Department has come to similar conclusions. In testimony early in October 2001 before the Senate Foreign Relations Committee's Subcommittee on Near East and South Asian Affairs, Assistant Secretary of State for South Asian Affairs Christina Rocca explained that:

> [t]wenty-two years of conflict have steadily devastated [Afghanistan], destroyed its physical and political infrastructure, shattered its institutions, and wrecked its socio-economic fabric. . . . The Taliban have shown no desire to provide even the most rudimentary health, education, and other social services expected of any government. Instead, they have chosen to devote their resources to waging war on the Afghan people, and exporting instability to their neighbors.[58]

Rather than performing normal government functions, the Taliban militia exhibited the characteristics of a criminal gang. The United Nations Security Council found that the Taliban militia extracted massive profits from illegal drug trafficking in Afghanistan and subsidized terrorism from those revenues.[59]

Third, the Taliban militia was unable to conduct normal foreign relations or to fulfill its international legal obligations. Publicly known facts suggest that the Taliban was unable to obey its international obligations and to conduct normal diplomatic relations. Thus, the Taliban militia consistently refused to comply with United Nations Security Council Resolutions 1333 (2000) and 1267 (1999), which called on it to surrender Osama bin Laden to justice and to take other actions to abate terrorism based in Afghanistan.[60] Those resolutions also called on all States to deny permission for aircraft to take off or to land if they were owned or operated by or for the Taliban, and to freeze funds and other resources owned or controlled by the Taliban. Reportedly, the Taliban militia also may have been unable to extradite bin Laden at the request of Saudi Arabia in September, 1998, despite its close relations with the Saudi government. As a

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[58] United States Department of State, International Information Programs, *Rocca Blames Taliban for Humanitarian Disaster in Afghanistan* (Oct. 10, 2001), *available at* http://www.usinfo.state.gov/regional/nea/sasia/afghan/text2001/1010roca.htm (visited Jan. 10, 2001).

[59] *See* U.N. Security Council Resolution 1333 (2000), *available at* http://www.un.org/Docs/scres/2000/res1333e.pdf (finding that "the Taliban benefits directly from the cultivation of illicit opium by imposing a tax on its production and indirectly benefits from the processing and trafficking of such opium, and . . . these substantial resources strengthen the Taliban's capacity to harbor terrorists"). The United States Government has amassed substantial evidence that the Taliban has condoned and profited from narco-trafficking on a massive scale, with disastrous effects on neighboring countries. *See The Taliban, Terrorism, and Drug Trade: Hearing Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources of the House Comm. on Government Reform*, 107th Cong. (2001) (testimony of William Bach, Director, Office of Asia, Africa, Europe, NIS Programs, Bureau of International Narcotics and Law Enforcement Affairs, Department of State; testimony of Asa Hutchinson, Administrator, Drug Enforcement Administration, U.S. Department of Justice).

[60] U.N. Security Council Resolution 1333 "strongly condemn[ed]" the Taliban for the "sheltering and training of terrorists and [the] planning of terrorist acts," and "deplor[ed] the fact that the Taliban continues to provide a safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations." U.N. Security Council Resolution 1214, ¶ 13 (1998) enjoined the Taliban to stop providing a sanctuary and training for terrorists. U.N. Security Council Resolution 1267, ¶ 2 (1999), stated that the Taliban's failure to comply with the Council's 1998 demand constituted a threat to the peace. *See* Sean D. Murphy, *Efforts to Obtain Custody of Osama Bin Laden*, 94 Am. J. Int'l L. 366 (2000).

result, the Saudi government expelled the Afghan *chargé d'affaires*.[61] The Taliban's continuing role in sheltering and supporting those believed to be responsible for the terrorist attacks of September 11, 2001 placed it in clear breach of international law, which required it to prevent the use of its territory as a launching pad for attacks against other nations.[62]

It has been suggested by government officials and independent press reports that the Taliban militia had become so subject to the domination and control of al Qaeda that it could not pursue independent policies with respect to the outside world.[63] Former Ambassador Robert Oakley described the relationship as "very close. The Taliban and bin Laden, particularly Mullah Omar, go way, way back . . . [Bin Laden] has helped the Taliban with material support since they began their movement in Afghanistan."[64] Richard Haass, Director of the State Department's Office of the Policy Planning Staff, has noted that the Taliban "have accepted substantial financial support from and proved themselves subservient to" al Qaeda.[65] Al Qaeda apparently supplied the Taliban regime with money, materiel, and personnel to help it gain the upper hand in its ongoing battles with the Northern Alliance.[66] Because al Qaeda was capable of mustering more formidable military forces than the Taliban at any given point, and because failure to protect bin Laden would have cost the Taliban the support of radical Islamists, it may well have been impossible for the Taliban to surrender bin Laden as directed by the United Nations, even if it had been willing to do so. While a policy decision to violate international law

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[61] *See* Yossef Bodansky, *Bin Laden: The Man Who Declared War on America* 301-02 (2001).

[62] *See* Robert F. Turner, *International Law and the Use of Force in Response to the World Trade Center and Pentagon Attacks*, *available at* http://jurist.law.pitt.edu/forum/forumnew34.htm (visited Jan. 10, 2002) ("If (as has been claimed by the US and UK governments) bin Laden masterminded the attacks on New York and Washington, Afghanistan is in breach of its state responsibility to take reasonable measures to prevent its territory from being used to launch attacks against other states. The United States and its allies thus have a legal right to violate Afghanistan's territorial integrity to destroy bin Laden and related terrorist targets. If the Taliban elects to join forces with bin Laden, it, too, becomes a lawful target."); *see also* W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. Int'l L. 3, 40-42, 51-54 (1999).

[63] *See, e.g.*, Michael Dobbs & Vernon Loeb, *2 U.S. Targets Bound by Fate*, Wash. Post, Nov. 14, 2001 at A22 ("According to Thomas Gouttierre, an Afghan expert at the University of Nebraska and a former UN adviser, the so-called Afghan Arabs surrounding bin Laden were much more educated and articulate than the often illiterate Taliban and succeeded in convincing them that they were at the head of a world-wide Islamic renaissance. 'Al Qaeda ended up hijacking a large part of the Taliban movement,' he said, noting that [Taliban supreme religious leader Mohammed] Omar and bin Laden were 'very, very tight' by 1998."); Peter Baker, *Defector Says Bin Laden Had Cash, Taliban In His Pocket*, Wash. Post, Nov. 30, 2001 at A1 (reporting claims by former Taliban official of al Qaeda's corruption of Taliban officials).

[64] *Online News Hour: The Taliban* (Sept. 15, 2001), *available at* http://www.pbs.org/newshour/bb/terrorism/july-dec01/taliban_9-15.html (visited Jan. 15, 2002).

[65] *The Bush Administration's Response to September 11th – and Beyond*, Remarks to the Council of Foreign Relations (Oct. 15, 2001), *available at* http://www.yale.edu/lawweb/avalon/sept_11/haass_001.htm (visited Jan. 15, 2002).

[66] The so-called "55th Brigade," a military force consisting primarily of Arabs under Syrian and Saudi commanders, was based outside of Kabul and was trained, maintained and paid for by al Qaeda. It "provided crucial support to Taliban forces during offensives against the Northern Alliance over the past five years." Michael Jansen, *US focused initially on bin Laden Mercenaries*, The Irish Times on the Web (Oct. 30, 2001), *available at* http://www.ireland.com/newspaper/world/2001/1030/wor6.htm (visited Jan. 15, 2002). According to some reports, these al Qaeda fighters were the most aggressive and ideologically committed forces available to the Taliban leadership, and were used to control other Taliban units. *See also* Michael Kranish & Indira A.R. Lakshmanan, *Partners in 'Jihad': Bin Laden Ties to Taliban*, Boston Globe, Oct. 28, 2001, at A1. This article contains especially detailed information about the close linkages between the two movements and their leaders.

would not be grounds to deny statehood, if al Qaeda – a non-governmental terrorist organization – possessed such power within Afghanistan to prevent its alleged rulers from taking action against it as ordered by the U.N., this would indicate that the Taliban militia did not exercise sufficient governmental control within the territory to fulfill its international obligations.

The Taliban militia's failure to carry out its international obligations became even further apparent during the conflict itself. During the United States' campaign in Afghanistan, Secretary Rumsfeld noted that the Taliban "are using mosques for ammunition storage areas. They are using mosques for command and control and meeting places. They are putting tanks and artillery pieces in close proximity to hospitals, schools, and residential areas."[67] In a series of "Fact Sheets" issued during the campaign, the State Department described in detail many of the atrocities committed by the Taliban and al Qaeda before and during the United States' military operations. These included massacres of both prisoners and civilians. For example, the State Department reported that in August, 2000, the Taliban had "executed POWs in the streets of Herat as a lesson to the local population."[68] The State Department also reported on November 2, 2001 that "[t]he Taliban have put the Afghan civilian population in grave danger by deliberately hiding their soldiers and equipment in civilian areas, including in mosques."[69] According to State, the Taliban "massacred hundreds of Afghan civilians, including women and children, in Yakaoloang, Mazar-I-Sharif, Bamiyan, Qezelabad, and other towns."[70] For example, the State Department noted, a report by the United Nations Secretary General regarding the July, 1999, massacre in the Shomaili Plains stated that "[t]he Taliban forces, who allegedly carried out these acts, essentially treated the civilian population with hostility and made no distinction between combatants and non-combatants."[71] All of this evidence goes to prove that the Taliban militia regularly refused to follow the laws of armed conflict, which, besides independently providing grounds for a presidential suspension of Geneva III, also demonstrate that Afghanistan had become a failed state and was under the control not of a government but of a violent terrorist group.

Fourth, the Taliban militia was not recognized as the legitimate government of Afghanistan by the United States or by any member of the international community except Pakistan. Neither the United States nor the United Nations ever recognized that the Taliban militia was a government. The only two other States that had maintained diplomatic relations with it before the current conflict began (Saudi Arabia and the United Arab Emirates) soon

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[67] *Transcript: Rumsfeld Says Taliban Functioning As Military Force Only, supra.*

[68] *Fact Sheet on Al Qaeda and Taliban Atrocities* (released Nov. 22, 2001 by Coalition Information Center), *available at* http://www.usinfo.state.gov/topical/pol/terror/01112301.htm (visited Jan. 15, 2002). The source cited for this particular report was the Defense Department.

[69] *Fact Sheet: Taliban Actions Imperil Afghan Civilians* (Nov. 2, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/01110203.htm (visited Jan. 15, 2002). Further, the State Department publicized reports from *The Washington Post* that the Taliban was using entire villages as human shields to protect their stockpiles of ammunition and weapons, that they were relocating the police ministry in Kandahar to mosques, that they had taken over NGO relief organization buildings, and that they were discovered transporting tanks and mortar shells in the guise of humanitarian relief. *Fact Sheet: The Taliban's Betrayal of the Afghan People* (Nov. 6, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/01110608.htm (visited Jan. 15, 2002).

[70] *Id.*

[71] *Id.* (quoting report; no citation given).

severed them.[72] Even Pakistan had withdrawn its recognition before the end of hostilities between the United States and the Taliban forces. This *universal* refusal to recognize the Taliban militia as a government demonstrates that other nations and the United Nations concurred in a judgment that the Taliban militia was no government and that Afghanistan had ceased to operate as a nation-State.

Indeed, the cabinet departments of the U.S. Government best positioned to determine whether Afghanistan constituted a failed state appear to have reached that conclusion some time ago. Secretary of Defense Donald Rumsfeld, for example, declared at a November 2, 2001 press conference that the "Taliban is not a government. The government of Afghanistan does not exist today. The Taliban never was a government as such. It was a force in the country that is not substantially weakened – in many cases cloistered away from the people."[73] Secretary Rumsfeld has made substantially the same remarks on several other occasions. On October 29, 2001, he described the Taliban as "an illegitimate, un-elected group of terrorists."[74] And on November 4, 2001, he stated at a press conference with the Foreign Minister of Pakistan that "Taliban is not really functioning as a government as such. There is really not a government to speak of in Afghanistan today."[75] On November 11, 2001, the Secretary emphasized the extent to which Afghanistan had fallen under the control of al Qaeda: "for all practical purposes, the al Qaeda has taken over the country."[76] Secretary Rumsfeld's final statement indicates his belief that no real government functioned in Afghanistan, but rather that groups of armed, violent militants had come into control.

In the recent past, the State Department took the same view. Near the start of the conflict, the Bureau of South Asian Affairs found that "[t]here is no functioning central government [in Afghanistan]. The country is divided among fighting factions. . . . The Taliban [is] a radical Islamic movement [that] occupies about 90% of the country."[77] Undersecretary of State Paula J. Dobriansky said on October 29, 2001, that "young Afghans cannot remember a time when their country really worked. There was a time – a little over 20 years ago – when Afghanistan was a functioning state, a member of the world community. . . . Unfortunately it is

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[72] *See A Look at the Taliban*, USA Today, Sept. 30, 2001, *available at* http://www.usatoday.com/news/world/2001/thetaliban.htm (visited Jan. 10, 2002). Indeed, Pakistan had been the only country in the world that maintained an embassy in Kabul; the overwhelming majority of States and the United Nations recognized exiled President Burhanuddin Rabbani and his government as the country's legal authorities. *See Taliban tactics move to hostage ploy*, Aug. 8, 2001, available at http://www.janes.com/regional_news/asia_pacific/news/jid/jid010808_1_n.shtml (visited Oct. 19, 2001).

[73] Secretary Rumsfeld Media Availability en Route to Moscow (Nov. 2, 2001), *available at* http://www.yale.edu/lawweb/avalon/sept_11/dod_brief64.htm (visited Jan. 15, 2002).

[74] *Rumsfeld Says Taliban to Blame for Casualties* (Oct. 29, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/01102905.htm (visited Jan. 15, 2002).

[75] *Transcript: Rumsfeld Says Taliban Functioning As Military Force Only* (Nov. 4, 2001), *available at* http:www.usinfo.state.gov/topical/pol/terror/0110403.htm (visited Jan. 15, 2002).

[76] *Rumsfeld on Afghanistan Developments on "Fox News Sunday,"* (Nov. 12, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/0111204.htm (visited Jan. 15, 2002).

[77] *Background Note* (October, 2001), *available at* http://www.state.gov/r/pa/bgn/index.cfm?docid=5380 (visited Jan. 10, 2002), prepared by the Bureau of South Asian Affairs. *See also* Reuters AlertNet - Afghanistan, *Country Profiles* ("There are no state-constituted armed forces. It is not possible to show how ground forces' equipment has been divided among the different factions."), *available at* http://www.alertnet.org/thefacts/countryprofiles/152478?version=1 (visited Jan. 15, 2002).

now difficult to remember that functioning Afghanistan."[78] As recently as December 12, 2001, the State Department's Office of International Information Programs, drawing on Coalition Information Center materials and media reports, stated that *both* the Taliban and al Qaeda "are terrorist organizations," and characterized the Taliban's leader, Mullah Omar, as "a terrorist."[79]

Some international officials concur with the views of our Government. Lakhdar Brahimi, for example, the United Nations mediator in Afghanistan and a former Algerian Foreign Minister, described Afghanistan under the Taliban as a "failed state which looks like an infected wound."[80] Tony Blair, the Prime Minister of Great Britain, on a visit to that country this month, declared that "Afghanistan has been a failed state for too long and the whole world has paid the price."[81]

Based on the foregoing, it is apparent that the publicly-available evidence would support the conclusion that Afghanistan, when largely controlled by the Taliban militia, failed some, and perhaps all, of the ordinary tests of statehood. Nor do we think that the military successes of the United States and the Northern Alliance change that outcome. Afghanistan *was* effectively stateless for the relevant period of the conflict, even if after the Bonn Agreement it became a State recognized by the United Nations, the United States, and most other nations.[82] The President can readily find that at the outset of this conflict, when the country was largely in the hands of the Taliban militia, there was no functioning central government in Afghanistan that was capable of providing the most basic services to the Afghan population, of suppressing endemic internal violence, or of maintaining normal relations with other governments. In other words, the Taliban militia would not even qualify as the *de facto* government of Afghanistan. Rather, it would have the status only of a violent faction or movement contending with other factions for control of Afghanistan's territory, rather than the regular armed forces of an existing state. This would provide sufficient ground for the President to exercise his constitutional power to suspend our Geneva III obligations toward Afghanistan.

### *C. Suspension Under International Law*

Although the President may determine that Afghanistan was a failed State as a matter of domestic law, there remains the distinct question whether suspension would be valid as a matter

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[78] Paula J. Dobransky, *Afghanistan: Not Always a Battlefield* (Oct. 29, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/01102908.htm (visited Jan. 15, 2002).

[79] *The End of the Taliban Reign of Terror in Afghanistan* (Dec. 12, 2001), *available at* http://www.usinfo.state.gov/topical/pol/terror/01121206.htm (visited Jan. 15, 2002).

[80] Rashid, *supra*, at 207.

[81] Philip Webster, *Blair's mission to Kabul*, The Times of London, Jan. 8, 2002, *available at* 2002 WL 4171996.

[82] We do not think that the military successes of the United States and the Northern Alliance necessarily meant that Afghanistan's statehood was restored before the Bonn agreement, if only because the international community, including the United States, did not regard the Northern Alliance as constituting the government of Afghanistan. United Nations Security Council Resolution 1378, ¶ 1 (2001), *available at* http://www.yale.edu/lawweb/avalon/sept_11/unsecres_1378.htm (visited Nov. 19, 2001), expressed "strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government" (emphasis added); *see also id.* ¶ 3 (affirming that the United Nations should play a central role in supporting Afghan efforts to establish a "new and transitional administration leading to the formation of a new government"). The plain implication of this Resolution, which reflects the views of the United States, is that Afghanistan after the Taliban did not have a government at that time.

of international law.[83] We emphasize that the resolution of that question, however, *has no bearing* on domestic constitutional issues, or on the application of the WCA. Rather, these issues are worth consideration as a means of justifying the actions of the United States in the world of international politics. While a close question, we believe that the better view is that, in certain circumstances, countries can suspend the Geneva Conventions consistently with international law.

International law has long recognized that the material breach of a treaty can be grounds for the party injured by the breach to terminate or withdraw from the treaty.[84] Under customary international law, the general rule is that breach of a multilateral treaty by a State party justifies the suspension of that treaty with regard to that State. "A material breach of a multilateral treaty by one of the parties entitles . . . [a] party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State."[85] If Afghanistan could be found in material breach for violating "a provision essential to the accomplishment of the object or purpose of the [Geneva Conventions]," suspension of the Conventions would have been justified.[86]

We note, however, that these general rules authorizing suspension "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."[87] Although the United States is not a party to the Vienna Convention, some lower courts have said that the Convention embodies the customary international law of treaties, and the State Department has at various times taken the same view.[88] The Geneva Conventions must be regarded as "treaties of a humanitarian character," many of whose provisions "relat[e] to the protection of the human person."[89] Arguably, therefore, a decision by the United States to suspend Geneva III with regard to Afghanistan might put the United States in breach of customary international law.

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[83] In general, of course, a decision by a State not to discharge its treaty obligations, even when effective as a matter of domestic law, does not necessarily relieve it of possible international liability for non-performance. *See generally Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934).

[84] *See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16, 47, ¶ 98 (Advisory Opinion June 21, 1971) (holding it to be a "general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character. . . . The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law[.]").

[85] Vienna Convention on Treaties, art. 60(2)(b).

[86] *Id.* art. 60(3).

[87] *Id.* art. 60(5). The Vienna Convention seems to prohibit or restrict the suspension of humanitarian treaties if the sole ground for suspension is material breach. It does not squarely address the case in which suspension is based, not on particular breaches by a party, but by the party's disappearance as a State or on its incapacity to perform its treaty obligations.

[88] *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), *cert. denied*, 122 S. Ct. 206 (2001); Moore, *supra*, at 891-92 (quoting 1971 statement by Secretary of State William P. Rogers and 1986 testimony by Deputy Legal Adviser Mary V. Mochary).

[89] *See* Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* 191 (2d ed. 1984) (explaining intent and scope of reference to "humanitarian" treaties). Indeed, when the drafters of the Vienna Convention added paragraph 5 to article 60, the Geneva Conventions were specifically mentioned as coming within it. *See* Harris, *supra*, at 797.

In addition, the Geneva Conventions could themselves be read to preclude suspension. Common article 1 pledges the High Contracting Parties "to respect and to ensure respect for the present Convention *in all circumstances*" (emphasis added). Some commentators argue that this provision should be read to bar any State party from refusing to enforce their provisions, no matter the conduct of its adversaries. In other words, the duty of performance is absolute and does not depend upon reciprocal performance by other State parties.[90] Under this approach, the substantive terms of the Geneva Conventions could never be suspended, and thus any violation would always be illegal under international law.

This understanding of the Vienna and Geneva Conventions cannot be correct. There is no textual provision in the Geneva Conventions that clearly prohibits temporary suspension. The drafters included a provision that precludes State parties from agreeing to absolve each other of violations.[91] They also included careful procedures for the termination of the agreements by individual State parties, including a provision that requires delay of a termination of a treaty, if that termination were to occur during a conflict, until the end of the conflict.[92] Yet, at the same time, the drafters of the Conventions did not address suspension at all, even though it has been a possible option since at least the eighteenth century.[93] Indeed, if the drafters and ratifiers of the Geneva Conventions believed the treaties could not be suspended, while allowing for withdrawal and denunciation, they could have said so explicitly and easily in the text.

A blanket non-suspension rule makes little sense as a matter of international law and politics. If there were such a rule, international law would leave an injured party effectively remediless if its adversaries committed material breaches of the Geneva Conventions. Apart from its unfairness, that result would reward and encourage non-compliance with the Conventions. True, the Conventions appear to contemplate that enforcement will be promoted by voluntary action of the parties.[94] Furthermore, the Conventions provide for intervention by "the International Committee of the Red Cross or any other impartial humanitarian organization . . . subject to the consent of the Parties to the conflict concerned."[95] But the effectiveness of these provisions depends on the good will of the very party assumed to be committing material breaches, or on its sensitivity to international opinion. Likewise, the provision authorizing an impartial investigation of alleged violations also hinges on the willingness of a breaching party to permit the investigation and to abide by its result. Other conceivable remedies, such as the imposition of an embargo by the United Nations on the breaching party, may also be inefficacious in particular circumstances. If, for example, Afghanistan were bound by Geneva Convention III to provide certain treatment to United States prisoners of war but in fact materially breached such duties, a United Nations embargo might have little effect on its behavior. Finally, offenders undoubtedly face a risk of trial and punishment before national or international courts after the conflict is over. Yet that form of relief presupposes that the offenders will be subject to capture at the end of the conflict - which may well depend on

[90] *See, e.g.*, Draper, *The Red Cross Conventions, supra*, at 8; *see also Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, 76 I.L.R. at 448, ¶ 220.
[91] *See, e.g.*, Geneva Convention III, art. 131.
[92] *See, e.g., id.*, art. 142.
[93] *See* Sinclair, *supra*, at 192.
[94] *See, e.g.*, the Geneva Convention III, art. 8; Geneva Convention IV, art. 9.
[95] Geneva Convention III, art. 9; Geneva Convention IV, art. 10.

whether or not they have been defeated. Reliance on post-conflict trials, as well as being uncertain, defers relief for the duration of the conflict. Without a power to suspend, therefore, parties to the Geneva Conventions would only be left with these meager tools to remedy widespread violation of the Conventions by others.

Thus, even if one were to believe that international law set out fixed and binding rules concerning the power of suspension, the United States could make convincing arguments under the Geneva Conventions itself, the Vienna Convention on Treaties, and customary international law in favor of suspending the Geneva Conventions as applied to the Taliban militia in the current war in Afghanistan.

### *D. Application of the Geneva Conventions As a Matter of Policy*

We conclude this Part by addressing a matter of considerable significance for policymakers. To say that the President may suspend specific provisions of the Geneva Conventions *as a legal requirement* is by no means to say that the principles of the laws of armed conflict cannot be applied *as a matter of U.S. Government policy*. There are two aspects to such policy decisions, one involving the protections of the laws of armed conflict and the other involving liabilities under those laws.

First, the President may determine that for reasons of diplomacy or in order to encourage other States to comply with the principles of the Geneva Conventions or other laws of armed conflict, it serves the interests of the United States to *treat* al Qaeda or Taliban detainees (or some class of them) as if they were prisoners of war, even though they do not have any legal entitlement to that *status*. We express no opinion on the merits of such a policy decision.

Second, the President as Commander in Chief can determine as a matter of his judgment for the efficient prosecution of the military campaign that the policy of the United States will be to enforce customary standards of the law of war against the Taliban and to punish any transgressions against those standards. Thus, for example, even though Geneva Convention III does not apply as a matter of law, the United States may deem it a violation of the laws and usages of war for Taliban troops to torture any American prisoners whom they may happen to seize. The U.S. military thus could prosecute Taliban militiamen for war crimes for engaging in such conduct.[96]

A decision to apply the principles of the Geneva Conventions or of others laws of war as a matter of policy, not law, would be fully consistent with the past practice of the United States. United States practice in post-1949 conflicts reveals several instances in which our military forces have applied Geneva III as a matter of policy, without acknowledging any legal obligation to do so. These cases include the wars in Korea and Vietnam and the interventions in Panama and Somalia.

[96] The President could, of course, also determine that it will be the policy of the United States to require its own troops to adhere to standards of conduct recognized under customary international law, and could prosecute offenders for violations. As explained below, the President is not *bound* to follow these standards by law, but may direct the armed forces to adhere to them as a matter of policy.

*Korea*. The Korean War broke out on June 25, 1950, before any of the major State parties to the conflict (including the United States) had ratified the Geneva Conventions. Nonetheless, General Douglas MacArthur, the United Nations Commander in Korea, declared that his forces would act consistently with the principles of the Geneva Conventions, including those relating to POWs. General MacArthur stated: "My present instructions are to abide by the humanitarian principles of the 1949 Geneva Conventions, particularly common article 3. In addition, I have directed the forces under my command to abide by the detailed provisions of the prisoner-of-war convention, since I have the means at my disposal to assure compliance with this convention by all concerned and have fully accredited the ICRC delegates accordingly."[97]

It should be noted, however, that deciding to follow Geneva III as a matter of policy would allow the United States to deviate from certain provisions it did not believe were appropriate to the current conflict. In Korea, for example, the United States did not fulfill the requirement that it repatriate all POWs at the end of the conflict. Pursuant to the armistice agreement, thousands of Chinese and North Korean POWs who did not wish to be repatriated were examined by an international commission, and many eventually ended up in Taiwan.[98]

*Viet Nam*. The United States through the State Department took the position that the Geneva Convention III "indisputably applies to the armed conflict in Viet Nam," and therefore that "American military personnel captured in the course of that armed conflict are entitled to be treated as prisoners of war."[99] We understand from the Defense Department that our military forces, as a matter of policy, decided at some point in the conflict to accord POW treatment (but not necessarily POW status) to Viet Cong members, despite the fact that they often did *not* meet the criteria for that status (set forth in Geneva Convention III, art. 4), *e.g.*, by not wearing uniforms or any other fixed distinctive signs visible at a distance.

*Panama*. The United States' intervention in Panama on December 20, 1989 came at the request and invitation of Panama's legitimately elected President, Guillermo Endara.[100] The United States had never recognized General Manuel Noriega, the commander of the Panamanian Defense Force, as Panama's legitimate ruler. Thus, in the view of the executive branch, the conflict was between the Government of Panama assisted by the United States on the one side and insurgent forces loyal to General Noriega on the other. It was not an international armed conflict between the United States and Panama, another State. Accordingly, it was not, in the executive's judgment, an international armed conflict governed by common article 2 of the Geneva Conventions.[101] Nonetheless, we understand that, as a matter of policy, all persons

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[97] *Quoted in* Joseph P. Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F.L. Rev. 1, 63 n.235 (2001).

[98] David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 Va. J. Int'l L. 801, 883-85 (1996).

[99] *Entitlement of American Military Personnel Held by North Viet-Nam to Treatment as Prisoners of War Under the Geneva Convention of 1949 Relative to the Treatment of Prisoners of War*, July 13, 1966, *reprinted in* John Norton Moore, *Law and the Indo-China War* 635, 639 (1972).

[100] *See United States v. Noriega*, 117 F.3d 1206, 1211 (11th Cir. 1997).

[101] *See* Jan E. Aldykiewicz and Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflict*, 167 Mil. L. Rev. 74, 77 n.6 (2001). In *United States v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992), the district court held that the United States' intervention in Panama in late 1989 was an international armed conflict under (common) Article 2 of the Geneva Convention III, and that General Noriega was entitled to POW status. To the extent that the holding

captured or detained by the United States in the intervention – including civilians and members of paramilitary forces as well as members of the Panamanian Defense Force – were *treated* consistently with the Geneva Convention III, until their precise status under that Convention was determined. A 1990 letter to the Attorney General from the Legal Adviser to the State Department said that "[i]t should be emphasized that the decision to extend basic prisoner of war protections to such persons was based on strong policy considerations, and was not necessarily based on any conclusion that the United States was obligated to do so as a matter of law."[102]

*Interventions in Somalia, Haiti and Bosnia*. There was considerable factual uncertainty whether the United Nations Operation in Somalia in late 1992 and early 1993 rose to the level of an "armed conflict" that could be subject to common article 3 of the Geneva Conventions, particularly after the United Nations Task Force abandoned its previously neutral role and took military action against a Somali warlord, General Aideed. Similar questions have arisen in other peace operations, including those in Haiti and Bosnia. It appears that the U.S. military has decided, as a matter of policy, to conduct operations in such circumstances as if the Geneva Conventions applied, regardless of whether there is any legal requirement to do so. The U.S. Army Operational Law Handbook, after noting that "[i]n peace operations, such as those in Somalia, Haiti, and Bosnia, the question frequently arises whether the [laws of war] legally applies," states that it is "the position of the US, UN and NATO that their forces will apply the 'principles and spirit' of the [law of war] in these operations."[103]

It might be argued, however, that the United States has conceded that Geneva III applied, as a matter of law, in every conflict since World War II. The facts, as supplied by our research and by the Defense Department, demonstrate otherwise. Although the United States at times has declared in different wars that the United States would accord Geneva Convention III treatment to enemy prisoners, there are several examples where the United States clearly decided not to comply with Geneva III as a matter of law. Further, such a position confuses situations in which the United States said it would act *consistently* with the Geneva Conventions with those in which we admitted that enemy prisoners would receive POW status as a matter of law. Our conduct in

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assumed that the courts are free to determine whether a conflict is between the United States and another "State" regardless of the President's view whether the other party is a "State" or not, we disagree with it. By assuming the right to determine that the United States was engaged in an armed conflict with *Panama* -- rather than with insurgent forces in rebellion against the recognized and legitimate Government of Panama -- the district court impermissibly usurped the recognition power, a constitutional authority reserved to the President. The power to determine whether a foreign government is to be accorded recognition, and the related power to determine whether a condition of statelessness exists in a particular country, are exclusively executive. *See, e.g., Baker v. Carr*, 369 U.S. 186, 212 (1962) ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing.' . . . Similarly, recognition of belligerency abroad is an executive responsibility. . . .") (citation omitted); *Kennett v. Chambers*, 55 U.S. (14 How.) 38, 50-51 (1852) ("[T]he question whether [the Republic of] Texas [while in rebellion against Mexico] had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals . . . were bound to consider . . . Texas as a part of the Mexican territory."); *Mingtai Fire & Marine Ins. Co. v. United Parcel Service*, 177 F.3d 1142, 1145 (9th Cir.) ("[T]he Supreme Court has repeatedly held that the Constitution commits to the Executive branch alone the authority to recognize, and to withdraw recognition from, foreign regimes."), *cert. denied*, 528 U.S. 951 (1999).

[102] Letter for the Hon. Richard L. Thornburgh, Attorney General, from Abraham D. Sofaer, Legal Adviser, State Department at 2 (Jan. 31, 1990).

[103] *Quoted in* Bialke, *supra*, at 56.

Panama provides an important example. There, the United States never conceded that the forces of Manuel Noriega qualified as POWs under the Geneva Convention, but did provide for them as a policy matter as if they were POWs.

## IV. Detention Conditions Under Geneva III

Even if the President decided not to suspend our Geneva III obligations toward Afghanistan, two reasons would justify some deviations from the requirements of Geneva III. This would be the case even if Taliban members legally were entitled to POW status. First, certain deviations concerning treatment can be justified on basic grounds of legal excuse concerning self-defense and feasibility. Second, the President could choose to find that none of the Taliban prisoners qualify as POWs under article 4 of Geneva III, which generally defines the types of armed forces that may be considered POWs once captured. In the latter instance, Geneva III would apply and the Afghanistan conflict would fall within common article 2's jurisdiction. The President, however, would be interpreting the treaty in light of the facts on the ground to find that the Taliban militia categorically failed the test for POWs within Geneva III's terms. We should be clear that we have no information that the conditions of treatment for Taliban prisoners currently violate Geneva III standards, but it is possible that some may argue that our GTMO facilities do not fully comply with all of the treaty's provisions.

### A. Justified Deviations from Geneva Convention Requirements

We should make clear that as we understand the facts, the detainees currently are being treated in a manner consistent with common article 3 of Geneva III. This means that they are housed in basic humane conditions, are not being physically mistreated, and are receiving adequate medical care. They have not yet been tried or punished by any U.S. court system. As a result, the current detention conditions in GTMO do not violate common article 3, nor do they present a grave breach of Geneva III as defined in article 130. For purposes of domestic law, therefore, the GTMO conditions do not constitute a violation of the WCA, which criminalizes only violations of common article 3 or grave breaches of the Conventions.

That said, some very well may argue that detention conditions currently depart from Geneva III requirements. Nonetheless, not all of these deviations from Geneva III would amount to an outright violation of the treaty's requirements. Instead, some departures from the text can be justified by some basic doctrines of legal excuse. We believe that some deviations would not amount to a treaty violation, because they would be justified by the need for force protection. Nations have the right to take reasonable steps for the protection of the armed forces guarding prisoners. At the national level, no treaty can override a nation's inherent right to self-defense. Indeed, the United Nations Charter recognizes this fundamental principle. Article 51 of the U.N. Charter provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." As we have discussed in other opinions relating to the war on terrorism, the September 11 attacks on the Pentagon and the World Trade Center have triggered the United States' right to defend itself.[104] Our national right to self-defense must encompass the lesser

[104] Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* at 22-33 (Nov.

included right to defend our own forces from prisoners who pose a threat to their lives and safety, just as the Nation has the authority to take measures in the field to protect the U.S. armed forces. Any Geneva III obligations, therefore, may be legally adjusted to take into account the needs of force protection.

The right to national self-defense is further augmented by the individual right to self-defense as a justification for modifications to Geneva III based on the need for force protection. Under domestic law, self-defense serves as a legal defense even to the taking of a human life. "[S]elf defense is . . . embodied in our jurisprudence as a consideration totally eliminating any criminal taint . . . . It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether . . . ."[105] As the U.S. Court of Appeals for the District of Columbia Circuit has observed, "[m]ore than two centuries ago, Blackstone, best known of the expositors of the English common law, taught that 'all homicide is malicious, and of course, amounts to murder, unless . . . *excused* on the account of accident or self-preservation . . . .' Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time . . . ."[106] Both the Supreme Court and this Office have opined that the use of force by law enforcement or the military is constitutional, even if it results in the loss of life, if necessary to protect the lives and safety of officers or innocent third parties.[107] Thus, as a matter of domestic law, the United States armed forces can modify their Geneva III obligations to take into account the needs of military necessity to protect their individual members.

Other deviations from Geneva III, which do not involve force protection, may still be justified as a domestic legal matter on the ground that immediate compliance is infeasible. Certain conditions, we have been informed, are only temporary until the Defense Department can construct permanent facilities that will be in compliance with Geneva. We believe that no treaty breach would exist under such circumstances. The State Department has informed us that state practice under the Convention allows nations a period of reasonable time to satisfy their affirmative obligations for treatment of POWs, particularly during the early stages of a conflict.[108] An analogy can be drawn here to a similar legal doctrine in administrative law. For

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6, 2001); Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States* at 2-3 (Oct. 17, 2001).

[105] *Griffin v. Martin*, 785 F.2d 1172, 1186-87 & n.37 (4th Cir. 1986), *aff'd by an equally divided court*, 795 F.2d 22 (4th Cir. 1986) (en banc), *cert. denied*, 480 U.S. 919 (1987).

[106] *United States v. Peterson*, 483 F.2d 1222, 1228-29 (D.C. Cir.) (footnote omitted), *cert denied*, 414 U.S. 1007 (1973).

[107] *See Tennessee v. Garner*, 471 U.S. 1, 7, 11 (1985) (Fourth Amendment "seizure" caused by use of force subject to reasonableness analysis); Memorandum to Files, from Robert Delahunty, Special Counsel, Office of Legal Counsel, *Re: Use of Deadly Force Against Civil Aircraft Threatening to Attack 1996 Summer Olympic Games* (Aug. 19, 1996); *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) ("[A] USG officer or employee may use deadly force against civil aircraft without violating [a criminal statute] if he or she reasonably believes that the aircraft poses a threat of serious physical harm . . . to another person.").

[108] During the India-Pakistan conflicts between 1965 and 1971, prisoners were able to correspond with their families, but there were "some difficulties in getting lists of all military prisoners" -- "[e]specially at the beginning of the conflict." Allan Rosas, *The Legal Status of Prisoners of War* at 186 (1976). Similarly, during the 1967 War in the Middle East, Israeli authorities delayed access to Arab prisoners on the grounds that "all facilities would be granted as soon as the prisoners were transferred to the camp at Atlith . . . In the meantime, delegates had the

example, it is a well-established principle that, where a statutory mandate fails to specify a particular deadline for agency action, a federal agency's duty to comply with that mandate is lawfully discharged, as long as it is satisfied within a reasonable time. The Administrative Procedure Act expressly provides that a "reviewing court shall . . . compel agency action unlawfully withheld or *unreasonably* delayed." 5 U.S.C. § 706 (emphasis added). Courts have recognized accordingly that a federal agency has a reasonable time to discharge its obligations.[109] Thus, "if an agency has no concrete deadline establishing a date by which it must act, . . . a court must compel only action that is delayed unreasonably. . . . [W]hen an agency is required to act--either by organic statute or by the APA--within an expeditious, prompt, or reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable."[110]

Here, Geneva III contains no strict deadlines for compliance. Indeed, it would be illogical to require immediate compliance, particularly if a nation were suddenly attacked and had no warning that POW facilities would be needed. Further, it might not be immediately practicable, given the conditions in the field where POWs would first be detained, to provide conditions that fully comply with Geneva III. Given that Geneva III has no mandated timetable, the armed forces have a reasonable time to satisfy their obligations of treatment with regard to POWs and are not guilty of breach when it is infeasible to achieve immediate compliance.

*B. Status of Taliban Prisoners Under Article 4*

Even if the President declines to suspend our obligations under Geneva III toward Afghanistan, it is possible that Taliban detainees still might not receive the legal status of POWs. Geneva III provides that once a conflict falls within common article 2, combatants must fall within one of several categories in order to receive POW status. Article 4(A)(1)-(3) sets out the three categories relevant here: i) members of the armed forces of a party to the conflict, along with accompanying militia and volunteer forces; ii) members of militia or volunteer corps who are commanded by an individual responsible to his subordinates, who have a distinctive sign recognizable from a distance, who carry arms openly, and who obey the laws of war; and iii) members of regular armed forces who profess allegiance to a government or authority that is not recognized by the detaining power. Should "any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," article 5 of Geneva III requires that these individuals "enjoy the protections of" the Convention until a tribunal has determined their status. As we understand it, as a matter of practice prisoners are presumed to have article 4 POW status until a tribunal determines otherwise.

Although these provisions seem to contemplate a case-by-case determination of an individual detainee's status, the President could determine categorically that all Taliban prisoners fall outside article 4. Under Article II of the Constitution, the President possesses the power to

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opportunity to see some of the prisoners at the transit camp at El Quantara and Kusseima." *Id.* at 203 (citation omitted). Although Israel was technically obliged under the Convention to provide access to Arab POWs, immediate compliance with that obligation was infeasible.

[109] *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987).

[110] *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999).

interpret treaties on behalf of the Nation.[111] He could interpret Geneva III, in light of the known facts concerning the operation of Taliban forces during the Afghanistan conflict, to find that all of the Taliban forces do not fall within the legal definition of prisoners of war as defined by article 4. A presidential determination of this nature would eliminate any legal "doubt" as to the prisoners' status, as a matter of domestic law, and would therefore obviate the need for article 5 tribunals.

We do not have, however, the facts available to advise your Department or the White House whether the President would have the grounds to apply the law to the facts in this categorical manner. Some of the facts which would be important to such a decision include: whether Taliban units followed a recognizable, hierarchical command-and-control structure, whether they wore distinctive uniforms, whether they operated in the open with their weapons visible, the tactics and strategies with which they conducted hostilities, and whether they obeyed the laws of war. If your Department were to conclude that the Afghanistan conflict demonstrated that the conduct of the Taliban militia had always violated these requirements, you would be justified in advising the President to determine that all Taliban prisoners are not POWs under article 4.

It is important to recognize that if the President were to pursue this line of reasoning, the executive branch would have to find that the Afghanistan conflict qualifies as an international war between two state parties to the Conventions. Article 4 is not a jurisdictional provision, but is instead only applied once a conflict has fallen within the definition of an international conflict covered by common article 2 of the Conventions. At this point in time, we cannot predict what consequences this acceptance of jurisdiction would have for future stages in the war on terrorism.

Nonetheless, if the President were to make such a determination, the WCA still would not impose any liability. As will be recalled, the WCA criminalizes either grave breaches of the Geneva Conventions or violations of common article 3. If members of the Taliban militia do not qualify as POWs under article 4, even though the conflict falls within common article 2's jurisdictional provisions, then their treatment cannot constitute a grave breach under Geneva III. Article 130 of Geneva III states that a grave breach occurs only when certain acts are committed against "persons . . . protected by the Convention." If the President were to find that Taliban prisoners did not constitute POWs under article 4, they would no longer be persons protected by the Convention. Thus, their treatment could not give rise to a grave breach under article 130, nor constitute a violation of the WCA.

Further, if the President were to find that all Taliban prisoners did not enjoy the status of POWs under article 4, they would not be legally entitled to the standards of treatment in common article 3. As the Afghanistan war is international in nature, involving as it does the use of force by state parties – the United States and Great Britain – which are outside of Afghanistan, common article 3 by its very terms would not apply. Common article 3, as we have explained earlier, does not serve as a catch-all provision that applies to all armed conflicts, but rather as a

[111] Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001).

specific complement to common article 2. Further, in reaching the article 4 analysis, the United States would be accepting that Geneva Convention jurisdiction existed over the conflict pursuant to common article 2. Common article 3 by its text would not apply, and therefore any violation of its terms would not constitute a violation of the WCA.

## V. *Customary International Law*

Thus far, this memorandum has addressed the issue whether the Geneva Conventions, and the WCA, apply to the detention and trial of al Qaeda and Taliban militia members taken prisoner in Afghanistan. Having concluded that these laws do not apply, we turn to the effect, if any, of customary international law. Some may take the view that even if the Geneva Conventions, by their terms, do not govern the treatment of al Qaeda and Taliban prisoners, the substance of these agreements has received such universal approval that it has risen to the status of customary international law. Customary international law, however cannot bind the executive branch under the Constitution because it is not federal law. This is a view that this Office has expressed before,[112] and is one consistent with the views of the federal courts,[113] and with executive branch positions before the courts.[114] Although we are not currently aware whether any detention conditions currently would violate customary international law, it should be clear that customary international law would not bind the President.

### A. *Is Customary International Law Federal Law?*

Under the view promoted by many international law academics, any presidential violation of customary international law is presumptively unconstitutional.[115] These scholars argue that customary international law is federal law, and that the President's Article II duty under the Take Care Clause requires him to execute customary international law as well as statutes lawfully enacted under the Constitution. A President may not violate customary international law, therefore, just as he cannot violate a statute, unless he believes it to be unconstitutional. Relying upon cases such as *The Paquete Habana*, 175 U.S. 677, 700 (1900), in which the Supreme Court observed that "international law is part of our law," this position often claims that the federal judiciary has the authority to invalidate executive action that runs counter to customary international law.[116]

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[112] *See Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163 (1989).

[113] *See, e.g., United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

[114] *See id.* at 669-70; *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935-36 (D.C. Cir. 1988); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986).

[115] *See, e.g.*, Michael J. Glennon, *Raising the* Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U. L. Rev. 321, 325 (1985); Louis Henkin, *International Law As Law in the United States*, 82 Mich. L. Rev. 1555, 1567 (1984); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1179 (1985); *see also* Jonathan R. Charney, *Agora: May the President Violate Customary International Law?*, 80 Am. J. Int'l L. 913 (1986).

[116] Recently, the status of customary international law within the federal legal system has been the subject of sustained debate with legal academia. The legitimacy of incorporating customary international law as federal law has been subjected in these exchanges to crippling doubts. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 817 (1997); *see also* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. Rev. 665, 672-673 (1986); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205, 1269

This view of customary international law is seriously mistaken. The constitutional text nowhere brackets presidential or federal power within the confines of customary international law. When the Supremacy Clause discusses the sources of federal law, it enumerates only "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States." U.S. Const. art. VI. Customary international law is nowhere mentioned in the Constitution as an independent source of federal law or as a constraint on the political branches of government. Indeed, if it were, there would have been no need to grant to Congress the power to "define and punish . . . Offenses against the Law of Nations."[117] It is also clear that the original understanding of the Framers was that "Laws of the United States" did *not* include the law of nations, as international law was called in the late eighteenth century. In explaining the jurisdiction of the Article III courts to cases arising "under the Constitution and the Laws of the United States," for example, Alexander Hamilton did not include the laws of nations as a source of jurisdiction.[118] Rather, Hamilton pointed out, claims involving the laws of nations would arise either in diversity cases or maritime cases,[119] which by definition do not involve "the Laws of the United States." Little evidence exists that those who attended the Philadelphia Convention in the summer of 1787 or the State ratifying conventions believed that federal law would have included customary international law, but rather that the laws of nations was part of a general common law that was not true federal law.[120]

Indeed, allowing customary international law to rise to the level of federal law would create severe distortions in the structure of the Constitution. Incorporation of customary international law directly into federal law would bypass the delicate procedures established by the Constitution for amending the Constitution or for enacting legislation.[121] Customary international law is not approved by two-thirds of Congress and three-quarters of the State legislatures, it has not been passed by both houses of Congress and signed by the President, nor is it made by the President with the advice and consent of two-thirds of the Senate. In other words, customary international law has not undergone the difficult hurdles that stand before enactment of constitutional amendments, statutes, or treaties. As such, it can have no legal effect

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(1988). These claims have not gone unchallenged. *See* Harold H. Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1827 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371, 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law As Federal Law After Erie*, 66 Fordham L. Rev. 393, 396-97 (1997). Bradley and Goldsmith have responded to their critics several times. *See* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv. L. Rev. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319, 330 (1997).

[117] U.S. Const. art. I, § 8, cl. 10.

[118] *The Federalist No. 80*, at 447-49 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

[119] *Id.* at 444-46.

[120] *See, e.g.*, Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 830-37 (1989); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1306-12 (1996); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319, 333-36 (1997).

[121] *Cf. INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto for failure to undergo bicameralism and presentment as required by Article I, Section 8 for all legislation).

on the government or on American citizens because it is not law.[122] Even the inclusion of treaties in the Supremacy Clause does not render treaties automatically self-executing in federal court, not to mention self-executing against the executive branch.[123] If even treaties that have undergone presidential signature and senatorial advice and consent can have no binding legal effect in the United States, then it certainly must be the case that a source of rules that never undergoes any process established by our Constitution cannot be law.

It is well accepted that the political branches have ample authority to override customary international law within their respective spheres of authority. This has been recognized by the Supreme Court since the earliest days of the Republic. In *The Schooner Exchange v. McFaddon*, for example, Chief Justice Marshall applied customary international law to the seizure of a French warship only because the United States government had not chosen a different rule.

> It seems then to the Court, to be a principle of public [international] law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction. Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals.[124]

In *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), Chief Justice Marshall again stated that customary international law "is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded."[125] In other words, overriding customary international law may prove to be a bad idea, or be subject to criticism, but there is no doubt that the government has the power to do it.

Indeed, proponents of the notion that customary international law is federal law can find little support in either history or Supreme Court case law. It is true that in some contexts, mostly involving maritime, insurance, and commercial law, the federal courts in the nineteenth century looked to customary international law as a guide.[126] Upon closer examination of these cases, however, it is clear that customary international law had the status only of the general federal common law that was applied in federal diversity cases under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). As such, it was not considered true federal law under the Supremacy Clause; it did not support Article III "arising under" jurisdiction; it did not pre-empt inconsistent state law; and it did not bind the executive branch. Indeed, even during this period, the Supreme Court acknowledged that the laws of war did not qualify as true federal law and could not therefore

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[122] In fact, allowing customary international law to bear the force of federal law would create significant problems under the Appointments Clause and the non-delegation doctrine, as it would be law made completely outside the American legal system through a process of international practice, rather than either the legislature or officers of the United States authorized to do so.

[123] *See, e.g., Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

[124] 11 U.S. (7 Cranch) 116, 145-46 (1812).

[125] *Id.* at 128.

[126] *See, e.g., Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442-43 (1924); *Huntington v. Attrill*, 146 U.S. 657, 683 (1892); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875).

serve as the basis for federal subject matter jurisdiction. In *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, for example, the Supreme Court declared that it had no jurisdiction to review "the general laws of war, as recognized by the law of nations applicable to this case," because such laws do not involve the Constitution, laws, treaties, or Executive proclamations of the United States.[127] The spurious nature of this type of law led the Supreme Court in the famous case of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), to eliminate general federal common law.

Even the case most relied upon by proponents of customary international law's status as federal law, *The Paquete Habana*, itself acknowledges that customary international law is subject to override by the action of the political branches. *The Paquete Habana* involved the question whether U.S. armed vessels in wartime could capture certain fishing vessels belonging to enemy nationals and sell them as prize. In that case, the Court applied an international law rule, and did indeed say that "international law is part of our law."[128] But Justice Gray then continued, "*where there is no treaty and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations." *Id.* (emphasis added). In other words, while it was willing to apply customary international law as general federal common law (this was the era of *Swift v. Tyson*), the Court also readily acknowledged that the political branches and even the federal judiciary could override it at any time. No Supreme Court decision in modern times has challenged that view.[129] Thus, under clear Supreme Court precedent, any presidential decision in the current conflict concerning the detention and trial of al Qaeda or Taliban militia prisoners would constitute a "controlling" Executive act that would immediately and completely override any customary international law norms.

Constitutional text and Supreme Court decisions aside, allowing the federal courts to rely upon international law to restrict the President's discretion to conduct war would raise deep structural problems. First, if customary international law is indeed federal law, then it must

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[127] 92 U.S. 286, 286-87.

[128] 175 U.S. at 700.

[129] Two lines of cases are often cited for the proposition that the Supreme Court has found customary international law to be federal law. The first derives from *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The "*Charming Betsy*" rule, as it is sometimes known, is a rule of construction that a statute should be construed when possible so as not to conflict with international law. This rule, however, does not apply international law of its own force, but instead can be seen as measure of judicial restraint: that violating international law is a decision for the political branches to make, and that if they wish to do so, they should state clearly their intentions. The second, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, applied the "act of state" doctrine, which generally precludes courts from examining the validity of the decisions of foreign governments taken on their own soil, as federal common law to a suit over expropriations by the Cuban government. As with *Charming Betsy*, however, the Court developed this rule as one of judicial self-restraint to preserve the flexibility of the political branches to decide how to conduct foreign policy.

Some supporters of customary international law as federal law rely on a third line of cases, beginning with *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filártiga*, the Second Circuit read the federal Alien Tort Statute, 28 U.S.C. §1350 (1994), to allow a tort suit in federal court against the former official of a foreign government for violating norms of international human rights law, namely torture. Incorporation of customary international law via the Alien Tort Statute, while accepted by several circuit courts, has never received the blessings of the Supreme Court and has been sharply criticized by some circuits, *see, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985), as well as by academics, see Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319, 330 (1997).

receive all of the benefits of the Supremacy Clause. Therefore, customary international law would not only bind the President, but it also would pre-empt state law and even supersede inconsistent federal statutes and treaties that were enacted before the rule of customary international law came into being. This has never happened. Indeed, giving customary international law this power not only runs counter to the Supreme Court cases described above, but would have the effect of importing a body of law to restrain the three branches of American government that never underwent any approval by our democratic political process. If customary international law does not have these effects, as the constitutional text, practice and most sensible readings of the Constitution indicate, then it cannot be true federal law under the Supremacy Clause. As non-federal law, then, customary international law cannot bind the President or the executive branch, in any legally meaningful way, in its conduct of the war in Afghanistan.

Second, relying upon customary international law here would undermine the President's control over foreign relations and his Commander in Chief authority. As we have noted, the President under the Constitution is given plenary authority over the conduct of the Nation's foreign relations and over the use of the military. Importing customary international law notions concerning armed conflict would represent a direct infringement on the President's discretion as the Commander in Chief and Chief Executive to determine how best to conduct the Nation's military affairs. Presidents and courts have agreed that the President enjoys the fullest discretion permitted by the Constitution in commanding troops in the field.[130] It is difficult to see what legal authority under our constitutional system would permit customary international law to restrict the exercise of the President's plenary power in this area, which is granted to him directly by the Constitution. Further, reading customary international law to be federal law would improperly inhibit the President's role as the representative of the Nation in its foreign affairs.[131] Customary law is not static; it evolves through a dynamic process of State custom and practice. "States necessarily must have the authority to contravene international norms, however, for it is the process of changing state practice that allows customary international law to evolve."[132] As we observed in 1989, "[i]f the United States is to participate in the evolution of international law, the Executive must have the power to act inconsistently with international law where necessary."[133] The power to override or ignore customary international law, even the law applying to armed conflict, is "an integral part of the President's foreign affairs power."[134]

Third, if customary international law is truly federal law, it presumably must be enforceable by the federal courts. Allowing international law to interfere with the President's

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[130] *See* Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) (reviewing authorities).

[131] "When articulating principles of international law in its relations with other states, the Executive branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns." *Sabbatino*, 376 U.S. at 432-33. *See also Rappenecker v. United States*, 509 F.Supp. 1024, 1029 (N.D. Cal. 1980) ("Under the doctrine of separation of powers, the making of those determinations [under international law] is entrusted to the President."); *International Load line Convention*, 40 Op. Att'y Gen. at 123-24 (President "speak[s] for the nation" in making determination under international law).

[132] 13 Op. O.L.C. at 170.

[133] *Id.*

[134] *Id.* at 171.

war power in this way, however, would expand the federal judiciary's authority into areas where it has little competence, where the Constitution does not textually call for its intervention, and where it risks defiance by the political branches. Indeed, treating customary international law as federal law would require the judiciary to intervene into the most deeply of political questions, those concerning war. This the federal courts have said they will not do, most recently during the Kosovo conflict.[135] Again, the practice of the branches demonstrates that they do not consider customary international law to be federal law. This position makes sense even at the level of democratic theory, because conceiving of international law as a restraint on warmaking would allow norms of questionable democratic origin to constrain actions validly taken under the U.S. Constitution by popularly accountable national representatives.

Based on these considerations of constitutional text, structure, and history, we conclude that customary international law does not bind the President or the U.S. Armed Forces in their decisions concerning the detention conditions of al Qaeda and Taliban prisoners.

*Conclusion*

For the foregoing reasons, we conclude that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions of al Qaeda prisoners. We also conclude that the President has the plenary constitutional power to suspend our treaty obligations toward Afghanistan during the period of the conflict. He may exercise that discretion on the basis that Afghanistan was a failed state. Even if he chose not to, he could interpret Geneva III to find that members of the Taliban militia failed to qualify as POWs under the terms of the treaty. We also conclude that customary international law has no binding legal effect on either the President or the military because it is not federal law, as recognized by the Constitution.

We should make clear that in reaching a decision to suspend our treaty obligations or to construe Geneva III to conclude that members of the Taliban militia are not POWs, the President need not make any specific finding. Rather, he need only authorize or approve policies that would be consistent with the understanding that al Qaeda and Taliban prisoners are not POWs under Geneva III.

Please let us know if we can provide further assistance.

Jay S. Bybee
Assistant Attorney General

[135] *See, e.g., Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000).

**January 25, 2002**

**From: White House Counsel Alberto Gonzales**

**To: President George W. Bush**

**RE: Geneva Convention - al Qaeda & Taliban Members**

DRAFT
1/25/2002 –3:30 pm

January 25, 2002

MEMORANDUM FOR THE PRESIDENT

FROM: ALBERTO R. GONZALES

SUBJECT: DECISION RE APPLICATION OF THE GENEVA CONVENTION ON PRISONERS OF WAR TO THE CONFLICT WITH AL QAEDA AND THE TALIBAN

Purpose

On January 18, I advised you that the Department of Justice had issued a formal legal opinion concluding that the Geneva Convention III on the Treatment of Prisoners of War (GPW) does not apply to the conflict with al Qaeda. I also advised you that DOJ's opinion concludes that there are reasonable grounds for you to conclude that GPW does not apply with respect to the conflict with the Taliban. I understand that you decided that GPW does not apply and, accordingly, that al Qaeda and Taliban detainees are not prisoners of war under the GPW.

The Secretary of State has requested that you reconsider that decision. Specifically, he has asked that you conclude that GPW does apply to both al Qaeda and the Taliban. I understand, however, that he would agree that al Qaeda and Taliban fighters could be determined not to be prisoners of war (POWs) but only on a case-by-case basis following individual hearings before a military board.

This memorandum outlines the ramifications of your decision and the Secretary's request for reconsideration.

Legal Background

As an initial matter, I note that you have the constitutional authority to make the determination you made on January 18 that the GPW does not apply to al Qaeda and the Taliban. (Of course, you could nevertheless, as a matter of policy, decide to apply the principles of GPW to the conflict with al Qaeda and the Taliban.) The Office of Legal Counsel of the Department of Justice has opined that, as a matter of international and domestic law, GPW does not apply to the conflict with al Qaeda. OLC has further opined that you have the authority to determine that GPW does not apply to the Taliban. As I discussed with you, the grounds for such a determination may include:

- A determination that Afghanistan was a failed state because the Taliban did not exercise full control over the territory and people, was not recognized by the international community, and was not capable of fulfilling its international obligations (e.g., was in widespread material breach of its international obligations).
- A determination that the Taliban and its forces were, in fact, not a government, but a militant, terrorist-like group.

OLC's interpretation of this legal issue is definitive. The Attorney General is charged by statute with interpreting the law for the Executive Branch. This interpretive authority extends to both domestic and international law. He has, in turn, delegated this role to OLC. Nevertheless, you should be aware that the Legal Adviser to the Secretary of State has expressed a different view.

Ramifications of Determination that GPW Does Not Apply

The consequences of a decision to adhere to what I understood to be your earlier determination that the GPW does not apply to the Taliban include the following:

Positive:

- Preserves flexibility:
  - As you have said, the war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians. In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments.
  - Although some of these provisions do not apply to detainees who are not POWs, a determination that GPW does not apply to al Qaeda and the Taliban eliminates any argument regarding the need for case-by-case determinations of POW status. It also holds open options for the future conflicts in which it may be more difficult to determine whether an enemy force as a whole meets the standard for POW status.
  - By concluding that GPW does not apply to al Qaeda and the Taliban, we avoid foreclosing options for the future, particularly against nonstate actors.
- Substantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441).
  - That statute, enacted in 1996, prohibits the commission of a "war crime" by or against a U.S. person, including U.S. officials. "War crime" for these purposes is defined to include any grave breach of GPW or any violation of common Article 3 thereof (such as "outrages against personal dignity"). Some of these provisions apply (if the GPW applies) regardless of whether the individual being detained qualifies as a POW. Punishments for violations of Section 2441 include the death penalty. A determination that the GPW is not applicable to the Taliban would mean that Section 2441 would not apply to actions taken with respect to the Taliban.
  - Adhering to your determination that GPW does not apply would guard effectively against misconstruction or misapplication of Section 2441 for several reasons.
    - First, some of the language of the GPW is undefined (it prohibits, for example, "outrages upon personal dignity" and "inhuman treatment"), and it is difficult to predict with confidence what actions might be deemed to constitute violations of the relevant provisions of GPW.
    - Second, it is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism.
    - Third, it is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441. Your determination would create a reasonable basis in law that Section 2441 does not apply, which would provide a solid defense to any future prosecution.

Negative:

On the other hand, the following arguments would support reconsideration and reversal of your decision that the GPW does not apply to either al Qaeda or the Taliban:

Since the Geneva Conventions were concluded in 1949, the United States has never denied their applicability to either U.S. or opposing forces engaged in armed conflict, despite several opportunities to do so. During the last Bush Administration, the United States stated that it "has a policy of applying the Geneva Conventions of 1949 whenever armed hostilities occur with regular foreign armed forces, even if arguments could be made that the threshold standards for the applicability of the Conventions . . . are not met."

- The United States could not invoke the GPW if enemy forces threatened to mistreat or mistreated U.S. or coalition forces captured during operations in Afghanistan, or if they denied Red Cross access or other POW privileges.
- The War Crimes Act could not be used against the enemy, although other criminal statutes and the customary law of war would still be available.
- Our position would likely provoke widespread condemnation among our allies and in some domestic quarters, even if we make clear that we will comply with the core humanitarian principles of the treaty as a matter of policy.
- Concluding that the Geneva Convention does not apply may encourage other countries to look for technical "loopholes" in future conflicts to conclude that they are not bound by GPW either
- Other countries may be less inclined to turn over terrorists or provide legal assistance to us if we do not recognize a legal obligation to comply with the GPW.
- A determination that GPW does not apply to al Qaeda and the Taliban could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries.

Response to Arguments for Applying GPW to the al Qaeda and the Taliban

On balance, I believe that the arguments for reconsideration and reversal are unpersuasive.

- The argument that the U.S. has never determined that GPW did not apply is incorrect. In at least one case (Panama in 1989) the U.S. determined that GPW did not apply even though it determined for policy reasons to adhere to the convention. More importantly, as noted above, this is a new type of warfare – one not contemplated in 1949 when the GPW was framed – and requires a new approach in our actions towards captured terrorists. Indeed, as the statement quoted from the administration of President George Bush makes clear, the U.S. will apply GPW "whenever hostilities occur *with regular foreign armed forces*." By its terms, therefore, the policy does not apply to a conflict with terrorists, or with irregular forces, like the Taliban, who are armed militants that oppressed and terrorized the people of Afghanistan.
- In response to the argument that we should decide to apply GPW to the Taliban in order to encourage other countries to treat captured U.S. military personnel in accordance with the GPW, it should be noted that your policy of providing humane treatment to enemy detainees gives us the credibility to insist on like treatment for our soldiers. Moreover, even if GPW is not applicable, we can still bring war crimes charges against anyone who mistreats U.S. personnel. Finally, I note that our adversaries in several recent conflicts have not been deterred by GPW in their treatment of captured U.S. personnel, and terrorists will not follow GPW rules in any event.
- The statement that other nations would criticize the U.S. because we have determined that GPW does not apply is undoubtedly true. It is even possible that some nations would point to that determination as a basis for failing to cooperate with us on specific matters in the war against terrorism. On the other hand, some international and domestic criticism is already likely to flow from your previous decision not to treat the detainees as POWs. And we can facilitate cooperation with other nations by reassuring them that we fully support GPW where it is applicable and by acknowledging that in this conflict the U.S. continues to respect other recognized standards.

- In the treatment of detainees, the U.S. will continue to be constrained by (i) its commitment to treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of GPW, (ii) its applicable treaty obligations, (iii) minimum standards of treatment universally recognized by the nations of the world, and (iv) applicable military regulations regarding the treatment of detainees.
- Similarly, the argument based on military culture fails to recognize that our military remain bound to apply the principles of GPW because that is what you have directed them to do.

[redacted]

[redacted]

[redacted]

**January 30, 2002**

# Letter of Resignation from Special Advisor Richard A. Clarke

THE WHITE HOUSE

WASHINGTON

January 30, 2003

1/31/03
THE PRESIDENT HAS SEEN

Dear Mr. President,

With the coming of 2003, I am now in my eleventh year of continuous White House service and the 30th year since I began my Government service. While there is never a good time to end an assignment, I believe now may be an appropriate point to move on.

First, with the stand up of the Department of Homeland Security, some of the operational responsibility for cyber security can now shift there. Second, you have signed the *National Strategy to Secure Cyberspace* and it will be publicly released shortly.

Thus, with your permission, I plan to depart the White House and resign as Special Advisor. It has been an enormous privilege to serve you these last 24 months.

I will always remember the courage, determination, calm, and leadership you demonstrated on September 11th, first on the video link from STRATCOM and later that day in the PEOC and the Situation Room. I will also have fond memories of our briefings for you on cyber security and the intuitive understanding of its importance that you showed. You had prescience in creating the position of Special Advisor to the President for Cyberspace Security and I urge you to maintain that role in the White House.

I thank you again for the opportunity to serve you have provided me and wish you good fortune as you lead our country through the continuing threats.

Sincerely

Dick Clarke

Richard A. Clarke

**Februry 1, 2002 - Department of Justice memo to President Bush reiterating position against the application of Geneva Convention to al Qaeda and the Taliban. Memo written by Attorney General John Ashcroft, summarizes the position of the Justice Department on why the Geneva Convention does not apply to al Qaeda or Taliban prisoners. Ashcroft warns against the possibility of U.S. officials being subject to prosecution for violating U.S. and international laws if the Geneva Conventions are applied.**

2-1-02

# Office of the Attorney General
## Washington, D. C. 20530

February 1, 2002

The President
The White House
Washington, DC

Dear Mr. President:

With your permission, I would like to comment on the National Security Council's discussion concerning the status of Taliban detainees. It is my understanding that the determination that al Qaeda and Taliban detainees are not prisoners of war remains firm. However, reconsideration is being given to whether the Geneva Convention III on prisoners of war applies to the conflict in Afghanistan.

There are two basic theories supporting the conclusion that Taliban combatants are not legally entitled to Geneva Convention protections as prisoners of war:

1. During relevant times of the combat, Afghanistan was a failed state. As such it was not a party to the treaty, and the treaty's protections do not apply;

2. During relevant times, Afghanistan *was* a party to the treaty, but Taliban combatants are not entitled to Geneva Convention III prisoner of war status because they acted as unlawful combatants.

If a determination is made that Afghanistan was a failed state (Option 1 above) and not a party to the treaty, various legal risks of liability, litigation, and criminal prosecution are minimized. This is a result of the Supreme Court's opinion in *Clark v. Allen* providing that when a President determines that a treaty does not apply, his determination is fully discretionary and will not be reviewed by the federal courts.

Thus, a Presidential determination against treaty applicability would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States.

In contrast, if a determination is made under Option 2 that the Geneva Convention applies but the Taliban are interpreted to be unlawful combatants not subject to the treaty's protections, *Clark v. Allen* does not accord American officials the same protection from legal consequences. In cases of Presidential interpretation of treaties which are confessed to apply, courts occasionally refuse to defer to Presidential interpretation. *Perkins v. Elg* is an example of such a case. If a

court chose to review for itself the facts underlying a Presidential interpretation that detainees were unlawful combatants, it could involve substantial criminal liability for involved U. S. officials.

We expect substantial and ongoing legal challenges to follow the Presidential resolution of these issues. These challenges will be resolved more quickly and easily if they are foreclosed from judicial review under the *Clark* case by a Presidential determination that the Geneva Convention III on prisoners of war does not apply based on the failed state theory outlined as Option 1 above.

In sum, Option 1, a determination that the Geneva Convention does not apply, will provide the United States with the highest level of legal certainty available under American law.

It may be argued that adopting Option 1 would encourage other states to allege that U.S. forces are ineligible for Geneva Convention III protections in future conflicts. From my perspective, it would be far more difficult for a nation to argue falsely that America was a "failed state" than to argue falsely that American forces had, in some way, forfeited their right to protections by becoming unlawful combatants. In fact, the North Vietnamese did exactly that to justify mistreatment of our troops in Vietnam. Therefore, it is my view that Option 2, a determination that the Geneva Convention III applies to the conflict in Afghanistan and that Taliban combatants are not protected because they were unlawful, could well expose our personnel to a greater risk of being treated improperly in the event of detention by a foreign power.

Option 1 is a legal option. It does not foreclose policy and operational considerations regarding actual treatment of Taliban detainees. Option 2, as described above, is also a legal option, but its legal implications carry higher risk of liability, criminal prosecution, and judicially-imposed conditions of detainment -- including mandated release of a detainee.

Clearly, considerations beyond the legal ones mentioned in this letter will shape and perhaps control ultimate decision making in the best interests of the United States of America.

Sincerely,

John Ashcroft

John Ashcroft
Attorney General

February 2nd, 2002

Memorandum

From: Department of State Legal Advisor William H Taft IV
To: White House Counsel

SUBJECT: Decisions by the President on applicant of the Geneva Connvestion toward Al Qaeda and Taliban prisoners

THE LEGAL ADVISER

DEPARTMENT OF STATE

WASHINGTON

February 2, 2002

MEMORANDUM

TO: Counsel to the President

FROM: William H. Taft, IV WHT

SUBJECT: Comments on Your Paper on the Geneva Convention

The paper should make clear that the issue for decision by the President is whether the Geneva Conventions apply to the conflict in Afghanistan in which U.S. armed forces are engaged. The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of DOS lawyers and, as far as is known, the position of every other party to the Conventions. It is consistent with UN Security Council Resolution 1193 affirming that "All parties to the conflict (in Afghanistan) are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions ..." It is not inconsistent with the DOJ opinion that the Conventions generally do not apply to our world-wide effort to combat terrorism and to bring al Qaeda members to justice.

From a policy standpoint, a decision that the Conventions apply provides the best legal basis for treating the al Qaeda and Taliban detainees in the way we intend to treat them. It demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations. Agreement by all lawyers that the War Crimes Act does not apply to our conduct means that the risk of prosecution under that statute is negligible. Any small benefit from reducing it further will be purchased at the expense of the men and women in our armed forces that we send into combat. A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged

deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.

The structure of the paper suggesting a distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict - al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.

Status of Legal Discussions re
Application of Geneva Convention to
Taliban and al Qaeda

1. Legal Conclusion re War Crimes Act Liability

- All lawyers involved in these discussions agree that the War Crimes Act does not apply to any actions taken by U.S. officials with respect to al Qaeda or Taliban detainees.

2. Applicability of GPW to Conflict With al Qaeda

- DOJ lawyers have concluded as matter of law that our conflict with al Qaeda, regardless of where it is carried out, is not covered by GPW. Lawyers from DOD, WHC, and OVP support that legal conclusion.
  - DOJ, DOD, WHC, and OVP lawyers believe that this conclusion is desirable from a domestic law standpoint because it provides the best possible insulation from any misapplication of the War Crimes Act to the conflict with al Qaeda, whether in Afghanistan or elsewhere.
  - DOJ, DOD, WHC, and OVP lawyers further believe that this conclusion is appropriate for policy reasons because it emphasizes that the worldwide conflict with al Qaeda is a new sort of conflict, one not covered by GPW or some other traditional rules of warfare.
- DOS lawyers believe that GPW applies to our treatment of al Qaeda members captured in Afghanistan on the theory that GPW applies to the conflict in Afghanistan, not to particular individuals or groups.
- JCS lawyers do not object to DOJ's legal conclusion, provided that JCS' policy concerns are addressed by statements that (1) the U.S. will treat all detainees as if the convention applied; (2) emphasize the importance we attach to the convention; and (3) emphasize our expectation that all other countries will treat our armed forces consistent with the convention.

3. Applicability of GPW to Conflict With the Taliban

- DOJ, WHC and OVP lawyers agree that the President has authority to determine to suspend GPW as between the U.S. and Afghanistan based on a conclusion that Afghanistan is a failed state.
- DOS lawyers ~~disagree with this conclusion and oppose such a determination.~~
- JCS lawyers oppose the determination on policy grounds to the extent that those policy considerations are not addressed as set forth in the last bullet of 1. above.
- All ~~relevant~~ lawyers agree that ~~(a)~~ Taliban detainees are not POWs ~~and (b) they do not fit within the class of those entitled to any of the other (i.e., non-POW) protections of GPW.~~ Thus all ~~relevant~~ lawyers agree that Taliban detainees will not benefit at all from GPW, whether or not GPW is suspended.

- DOJ lawyers believe that it is desirable to adhere to the President's determination of January 18 that GPW does not apply to our conflict with the Taliban in order to provide the best possible level of protection against misapplication of the War Crimes Act. OVP, DOD and WHC lawyers agree that the President's January 18 determination provides the best possible level of protection.

Omit. 1. unless this ...

4. POW Status

- The lawyers involved all agree that al Qaeda or Taliban soldiers are presumptively not POWs, consistent with the President's determination of January 18.

5. Further Screening

- DOJ, WHC, and OVP lawyers believe ~~that the President has definitively determined~~ that al Qaeda and Taliban soldiers who come under U.S. control are not entitled to POW status. ~~They further believe that this determination is conclusive~~ and that no procedures are needed for further screening of any al Qaeda or Taliban detainees. They also believe that non-POW status affords the flexibility to release or transfer any prisoner determined not to be an appropriate candidate for detention, e.g., because he is a low level recruit who poses no continuing threat and who has no relevant information.

The matter is being reviewed

- DOD, JCS and DOS lawyers believe that, in the unlikely event that "doubt should arise" as to whether a particular detainee does not qualify for POW status, we should be prepared to offer additional screening on a case-by-case basis, either *pursuant to* Article 5 of GPW (to the extent the convention applies) or *consistent with* Article 5 (to the extent it does not). [The National Security Advisor has advised the Canadian government that this is our policy.]

I confirm

6. CIA Issues

X. ... does not ... the ... of the ... limitation

- The lawyers involved all agree that the CIA is bound by the same legal restrictions as the U.S. military.
- They further agree that the CIA enjoys the same high level of protection from liability under the War Crimes Act as the U.S. military.
- CIA lawyers believe that, to the extent that GPW's protections do not apply as a matter of law but those protections are applied as a matter of policy, it is desirable to circumscribe that policy so as to limit its application to the CIA. The other lawyers involved did not disagree with or object to CIA's view.

(A) [redacted bullets]

- DOS lawyers believe this conclusion is desirable from a domestic and international law standpoint because it provides the best legal basis for our detailed treatment of the detainees and strengthens the Geneva Convention protections of our forces in Afghanistan and other conflicts.
- DOS lawyers further believe this conclusion is appropriate for policy reasons because it implies that even in a new sort of conflict the United States bases its conduct on its international treaty obligations and the rule of law, not just its policy preferences.

## Insert A

- DOS lawyers believe this conclusion is desirable from a domestic and international law standpoint because it provides the best legal basis for our intended treatment of the detainees and strengthens the Geneva Convention protections of our forces in Afghanistan and other conflicts.

- DOS lawyers further believe this conclusion is appropriate for policy reasons because it emphasizes that even in a new sort of conflict the United States bases its conduct on its international treaty obligations and the rule of law, not just on its policy preferences.

February 7, 2002

Department of Justice memo to the White House Counsel

Status of Taliban combatants. Head of the Office of Legal Counsel at the Justice Department, Assistant Attorney General Jay S. Bybee, states the Department's conclusion that the President "has reasonable factual grounds" to determine that members of the Taliban captured in Afghanistan are not entitled to prisoner of war (POW) status under the Geneva Convention.

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

February 7, 2002

**Memorandum for Alberto R. Gonzales**
**Counsel to the President**

*Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*

You have asked for our Office's views concerning the status of members of the Taliban militia under Article 4 of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War ("GPW"). Assuming the accuracy of various facts provided to us by the Department of Defense ("DoD"), we conclude that the President has reasonable factual grounds to determine that no members of the Taliban militia are entitled to prisoner of war ("POW") status under GPW. First, we explain that the Taliban militia cannot meet the requirements of Article 4(A)(2), because it fails to satisfy at least three of the four conditions of lawful combat articulated in Article 1 of the Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land ("Hague Convention"), which are expressly incorporated into Article 4(A)(2). Second, we note that neither Article 4(A)(1) nor Article 4(A)(3) apply to militia, and that the four conditions of lawful combat contained in the Hague Convention also govern Article 4(A)(1) and (3) determinations in any case. Finally, we explain why there is no need to convene a tribunal under Article 5 to determine the status of the Taliban detainees.

I.

Article 4(A) of GPW defines the types of persons who, once they have fallen under the control of the enemy, are entitled to the legal status of POWs. The first three categories are the only ones relevant to the Taliban. Under Article 4(A)(1), individuals who are "members of the armed forces of a Party to the conflict," are entitled to POW status upon capture. Article 4(A)(3) includes as POWs members of "regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

Article 4(A)(2) includes as POWs members of "other militias" and "volunteer corps," including "organized resistance movements" that belong to a Party to the conflict. In addition, members of militias and volunteer corps must "fulfill" four conditions: (a) "being commanded by a person responsible for his subordinates"; (b) "having a fixed distinctive sign recognizable at a distance"; (c) "carrying arms openly"; and (d) "conducting their operations in accordance with the laws and customs of war." Those four conditions reflect those required in the 1907 Hague Convention IV. *See Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 49 (Red Cross 1952) ("Red Cross Commentary") ("during the 1949 Diplomatic

Conference . . . there was unanimous agreement that the categories of persons to whom the Convention is applicable must be defined, in harmony with the Hague Regulations").

Should "any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," GPW Article 5 requires that these individuals "enjoy the protections of" the Convention until a tribunal has determined their status.

Thus, in deciding whether members of the Taliban militia qualify for POW status, the President must determine whether they fall within any of these three categories. Under Article II of the Constitution, the President possesses the power to interpret treaties on behalf of the Nation. Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001). This includes, of course, the power to apply treaties to the facts of a given situation. Thus, the President may interpret GPW, in light of the known facts concerning the operation of Taliban forces during the Afghanistan conflict, to find that all of the Taliban forces do not fall within the legal definition of POW. A presidential determination of this nature would eliminate any legal "doubt" as to the prisoners' status, as a matter of domestic law, and would therefore obviate the need for article 5 tribunals.

We believe that, based on the facts provided by the Department of Defense, see Rear Admiral L.E. Jacoby, U.S. Navy, J-2, *Information Paper, Subject: Background Information on Taliban Forces* (Feb. 6, 2002), the President has reasonable grounds to conclude that the Taliban, as a whole, is not legally entitled to POW status under Articles 4(A)(1) through (3).

II.

As the Taliban have described themselves as a militia, rather than the armed forces of Afghanistan, we begin with GPW's requirements for militia and volunteer corps under Article 4(A)(2). Based on the facts presented to us by DoD, we believe that the President has the factual basis on which to conclude that the Taliban militia, as a group, fails to meet three of the four GPW requirements, and hence are not legally entitled to POW status.

First, there is no organized command structure whereby members of the Taliban militia report to a military commander who takes responsibility for the actions of his subordinates. The Taliban lacks a permanent, centralized communications infrastructure. Periodically, individuals declared themselves to be "commanders" and organized groups of armed men, but these "commanders" were more akin to feudal lords than military officers. According to DoD, the Taliban militia functioned more as many different armed groups that fought for their own tribal, local, or personal interests.

Moreover, when the armed groups organized, the core of the organization was often al Qaeda, a multinational terrorist organization, whose existence was not in any way accountable to or dependent upon the sovereign state of Afghanistan. We have previously concluded, as a matter of law, that al Qaeda members are not covered by GPW. See Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes II, General Counsel of the

Department of Defense, from Jay S. Bybee, Assistant Attorney General, Re: Applications of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002). After October 7, when the United States armed forces began aerial bombing of al Qaeda and Taliban targets in Afghanistan, the distinction between Taliban and al Qaeda became even more blurred as al Qaeda assumed the lead in organizing the defense.

DoD's facts suggest that to the extent the Taliban militia was organized at all, it consisted of a loose array of individuals who had shifting loyalties among various Taliban and al Qaeda figures. According to DoD, the Taliban lacked the kind of organization characteristic of the military. The fact that at any given time during the conflict the Taliban were organized into some structured organization does not answer whether the Taliban leaders were responsible for their subordinates within the meaning of GPW. Armed men who can be recruited from other units, as DoD states, through defections and bribery are not subject to a commander who can discipline his troops and enforce the laws of war.

Second, there is no indication that the Taliban militia wore any distinctive uniform or other insignia that served as a "fixed distinctive sign recognizable at a distance." DoD has advised us that the Taliban wore the same clothes they wore to perform other daily functions, and hence they would have been indistinguishable from civilians. Some have alleged that members of the Taliban would wear black turbans, but apparently this was done by coincidence rather than design. Indeed, there is no indication that black turbans were systematically worn to serve as an identifying feature of the armed group.

Some of the Taliban militia carried a tribal flag. DoD has stated that there is no indication that any individual members of the Taliban wore a distinctive sign or insignia that would identify them if they were not carrying or otherwise immediately identified with a tribal flag. Moreover, DoD has not indicated that tribal flags marked only military, as opposed to civilian, groups.

Third, the Taliban militia carried arms openly. This fact, however, is of little significance because many people in Afghanistan carry arms openly. Although Taliban forces did not generally conceal their weapons, they also never attempted to distinguish themselves from other individuals through the arms they carried or the manner in which they carried them. Thus, the Taliban carried their arms openly, as GPW requires military groups to do, but this did not serve to distinguish the Taliban from the rest of the population. This fact reinforces the idea that the Taliban could neither be distinguished by their uniforms and insignia nor by the arms they carried from Afghani civilians.

Finally, there is no indication that the Taliban militia understood, considered themselves bound by, or indeed were even aware of, the Geneva Conventions or any other body of law. Indeed, it is fundamental that the Taliban followed their own version of Islamic law and regularly engaged in practices that flouted fundamental international legal principles. Taliban militia groups have made little attempt to distinguish between combatants and non-combatants when engaging in hostilities. They have killed for racial or religious purposes. Furthermore, DoD informs us of widespread reports of Taliban massacres of civilians, raping of women, pillaging of villages, and various other atrocities that plainly violate the laws of war.

Based on the above facts, apparently well known to all persons living in Afghanistan and joining the Taliban, we conclude that the President can find that the Taliban militia is categorically incapable of meeting the Hague conditions expressly spelled out in Article 4(A)(2) of GPW.

III.

One might argue that the Taliban is not a "militia" under Article 4(A)(2), but instead constitutes the "armed forces" of Afghanistan. Neither Article 4(A)(1), which grants POW status to members of the armed forces of a state party, nor Article 4(A)(3), which grants POW status to the armed forces of an unrecognized power, defines the term "armed forces." Unlike the definition of militia in Article 4(A)(2), these two other categories contain no conditions that these groups must fulfill to achieve POW status. Moreover, because GPW does not expressly incorporate Article 4(A)(2)'s four conditions into either Article 4(A)(1) or (3), some might question whether members of regular armed forces need to meet the Hague conditions in order to qualify for POW status under GPW.

We conclude, however, that the four basic conditions that apply to militias must also apply, at a minimum, to members of armed forces who would be legally entitled to POW status. In other words, an individual cannot be a POW, even if a member of an armed force, unless forces also are: (a) "commanded by a person responsible for his subordinates"; (b) "hav[e] a fixed distinctive sign recognizable at a distance"; (c) "carry[] arms openly"; and (d) "conduct[] their operations in accordance with the laws and customs of war." Thus, if the President has the factual basis to determine that Taliban prisoners are not entitled to POW status under Article 4(A)(2) as members of a militia, he therefore has the grounds to also find that they are not entitled to POW status as members of an armed force under either Article 4(A)(1) or Article 4(A)(3).

Article 4(A)'s use of the phrase "armed force," we believe, incorporated by reference the four conditions for militia, which originally derived from the Hague Convention IV. There was no need to list the four Hague conditions in Article 4(A)(1) because it was well understood under preexisting international law that all armed forces were already required to meet those conditions. As would have been understood by the GPW's drafters, use of the term "armed forces" incorporated the four criteria, repeated in the definition of militia, that were first used in the Hague Convention IV.

The view that the definition of an armed force includes the four criteria outlined in Hague Convention IV and repeated in GPW is amply supported by commentators. As explained in a recently-issued Department of the Army pamphlet, the four Hague conditions are "arguably part and parcel of the definition of a regular armed force. It is unreasonable to believe that a member of a regular armed force could conduct military operations in civilian clothing, while a member of the militia or resistance groups cannot. Should a member of the regular armed forces do so, it is likely that he would lose his claim to immunity and be charged as a spy or as an illegal combatant." Major Geoffrey S. Corn & Major Michael L. Smidt, *"To Be Or Not To Be, That Is The Question": Contemporary Military Operations and the Status of Captured Personnel*,

Department of the Army Pamphlet 27-50-319, 1999-Jun. Army Law. 1, 14 n.127 (1999). One scholar has similarly concluded that "[u]nder the Hague Convention, a person is a member of the armed forces of a state only if he satisfies the [four enumerated] criteria." Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int'l L.J. 145, 184 n.140 (2000). *See also* Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications For the Law of Armed Conflict*, 19 Mich. J. Int'l L. 1051, 1078 (1998) ("[U]nder the Regulations annexed to Hague Convention IV, combatants were those who were members of the regular armed forces (or formal militia), were commanded by a person responsible for their conduct, wore a fixed distinctive emblem (or uniform), carried their weapons openly, and conducted operations in accordance with the law of war. The 1949 Geneva Convention on Prisoners of War extended this status to members of an organized resistance movement which otherwise complied with the Hague IV requirements.").

Further, it would be utterly illogical to read "armed forces" in Article 4(A)(1) and (3) as somehow relieving members of armed forces from the same POW requirements imposed on members of a militia. There is no evidence that any of the GPW's drafters or ratifiers believed that members of the regular armed forces ought to be governed by *lower standards* in their conduct of warfare than those applicable to militia and volunteer forces. Otherwise, a sovereign could evade the Hague requirements altogether simply by designating all combatants as members of the sovereign's regular armed forces. A sovereign, for example, could evade the status of spies as unlawful combatants simply by declaring all spies to be members of the regular armed forces, regardless of whether they wore uniforms or not. Further, it would make little sense to construe GPW to deny some members of militias or volunteer corps POW protection for failure to satisfy the Hague conditions (under Article 4(A)(2)), while conferring such status upon other members simply because they have become part of the regular armed forces of a party (under Article 4(A)(1)).

This interpretation of "armed force" in GPW finds direct support in the International Committee of the Red Cross, the non-governmental organization primarily responsible for, and most closely associated with, the drafting and successful completion of GPW. After the Conventions were established, the Committee started work on a Commentary on all of the Geneva Conventions. In its discussion of Article 4(A)(3) of GPW, the ICRC construed both Article 4(A)(1) and (3) to require all regular armed forces to satisfy the four Hague IV (and Article 4(A)(2)) conditions:

> [t]he expression "members of regular armed forces" denotes armed forces which differ from those referred to in sub-paragraph (1) of this paragraph in one respect only: the authority to which they profess allegiance is not recognized by the adversary as a Party to the conflict. These "regular armed forces" have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2) (a), (b), (c) and (d).

Red Cross Commentary at 62-63 (emphasis added).

Numerous scholars have similarly interpreted GPW as applying the four conditions to Article 4(A)(1) and (3) as well as to Article 4(A)(2). As Professor Howard S. Levie, a leading expert on the laws of war and the Geneva Conventions in particular, has explained in his authoritative treatise:

> This enumeration [of the four conditions] does not appear in subparagraph 1, dealing with the regular armed forces. This does not mean that mere membership in the regular armed forces will automatically entitle an individual who is captured to prisoner-of-war status if his activities prior to and at the time of capture have not met these requirements. The member of the regular armed forces wearing civilian clothes who is captured while in enemy territory engaged in an espionage or sabotage mission is entitled to no different treatment than that which would be received by a civilian captured under the same circumstances. Any other interpretation would be unrealistic as it would mean that the dangers inherent in serving as a spy or saboteur could be immunized merely by making the individual a member of the armed forces; and that members of the armed forces could act in a manner prohibited by other areas of the law of armed conflict and escape the penalties therefore, still being entitled to prisoner-of-war status.

Howard S. Levie, 59 International Law Studies: Prisoners of War in International Armed Conflict 36-37 (Naval War College 1977). Oxford Professor Ingrid Detter has similarly concluded that, under the 1949 Geneva Conventions,

> to be a combatant, a person would have to be:
>
> (a) commanded by a person responsible for his subordinates;
> (b) having a fixed distinctive sign recognizable at a distance;
> (c) carrying arms openly;
> (d) conducting their operations in accordance with the laws and customs of war.
>
> The same requirements as apply to irregular forces are presumably also valid for members of regular units. However, this is not clearly spelt out: there is no textual support for the idea that members of regular armed forces should wear uniform. On the other hand, there is ample evidence that this is a rule of law which has been applied to a number of situations to ascertain the status of a person. Any regular soldier who commits acts pertaining to belligerence in civilian clothes loses his privileges and is no longer a lawful combatant. 'Unlawful' combatants may thus be either members of the regular forces or members of resistance or guerilla movements who do not fulfil the conditions of lawful combatants.

*Ingrid Detter, The Law of War 136-37 (Cambridge 2d ed. 2000).* See also Christopher C. Burris, *The Prisoner of War Status of PLO Fedayeen*, 22 N.C. J. Int'l L. & Com. Reg. 943, 987

n.308 (1997) ("I am using Article 4A(2)'s four criteria because the armed forces of the Palestinian Authority, over 30,000 men under arms organized into roughly ten or more separate para-military units, are more characteristic of militia units than the regular armed forces of a state. This is because these units are organized as police/security units, not exclusive combat units. See Graham Usher, Palestinian Authority, Israeli Rule, The Nation, Feb. 5, 1996, at 15, 16. Whether the Palestinian Authority's forces are considered militia or members of the armed forces, they still must fulfill Article 4A(2)'s four criteria.").[1]

Therefore, it is clear that the term "armed force" includes the four conditions first identified by Hague Convention IV and expressly applied by GPW to militia groups. In other words, in order to be entitled to POW status, a member of an armed force must (a) be "commanded by a person responsible for his subordinates"; (b) "hav[e] a fixed distinctive sign recognizable at a distance"; (c) "carry[] arms openly"; and (d) "conduct[] their operations in accordance with the laws and customs of war." We believe that the President, based on the facts supplied by DoD, has ample grounds upon which to find that members of the Taliban have failed to meet three of these four criteria, regardless of whether they are characterized as members of a "militia" or of an "armed force." The President, therefore, may determine that the Taliban, as a group, are not entitled to POW status under GPW.

IV.

Under Article 5 of GPW, "[s]hould any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." As we understand it, DoD in the past has presumed prisoners to be entitled to POW status until a

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[1] The only federal court we are aware of that has addressed this issue denied Article 4(A)(3) status to defendants because they could not satisfy the Hague conditions. In *United States v. Buck*, 690 F. Supp. 1291 (S.D.N.Y. 1988), the defendants claimed that they were entitled to POW status as military officers of the Republic of New Afrika, "a sovereign nation engaged in a war of liberation against the colonial forces of the United States government." *Id.* at 1293. That nation, it was contended, included "all people of African ancestry living in the United States." *Id.* at 1296. The court refused to extend POW status to the defendants. After determining that GPW did not apply at all due to the absence of an armed conflict as understood under Article 2, the court alternatively reasoned that the defendants could not satisfy any of the requirements of Article 4. *See id.* at 1298 (stating that, even if GPW applied, "it is entirely clear that these defendants would not fall within Article 4, upon which they initially relied"). The court first concluded that the defendants failed to meet the four Hague conditions expressly spelled out in Article 4(A)(2). The court then rejected POW status under Article 4(A)(3) "[f]or comparable reasons":

> Article 4(A)(2) requires that to qualify as prisoners of war, members of 'organized resistance movements' must fulfill the conditions of command by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war. The defendants at bar and their associates cannot pretend to have fulfilled those conditions. *For comparable reasons*, Article 4(3)'s reference to members of 'regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power', also relied upon by defendants, does not apply to the circumstances of this case.

*Id.* (emphasis added). The court reached this conclusion even though the Hague conditions are not explicitly spelled out in Article 4(A)(3). Nothing in the court's discussion suggests that it would have construed Article 4(A)(1) any differently.

tribunal determines otherwise. The presumption and tribunal requirement are triggered, however, only if there is "any doubt" as to a prisoner's Article 4 status.

Under Article II of the Constitution, the President possesses the power to interpret treaties on behalf of the Nation.[2] We conclude, in light of the facts submitted to us by the Department of Defense and as discussed in Parts II and III of this memorandum, that the President could reasonably interpret GPW in such a manner that none of the Taliban forces fall within the legal definition of POWs as defined by Article 4. A presidential determination of this nature would eliminate any legal "doubt" as to the prisoners' status, as a matter of domestic law, and would therefore obviate the need for Article 5 tribunals.

This approach is also consistent with the terms of Article 5. As the International Committee of the Red Cross has explained, the "competent tribunal" requirement of Article 5 applies "to cases of doubt as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in Article 4." *Red Cross Commentary* at 77. Tribunals are thus designed to determine whether a particular set of facts falls within one of the Article 4 categories; they are not intended to be used to resolve the proper interpretation of those categories. The President, in other words, may use his constitutional power to interpret treaties and apply them to the facts, to make the determination that the Taliban are unlawful combatants. This would remove any "doubt" concerning whether members of the Taliban are entitled to POW status.

We therefore conclude that there is no need to establish tribunals to determine POW status under Article 5.

Please let us know if we can provide further assistance.

Jay S. Bybee
Assistant Attorney General

[2] *See* Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001).

February 7, 2002

President George Bush memo to his National Security Advisors

Cconcerning the application of Geneva Convention in the Afghanistan conflict. In the memo, President Bush states his belief that he has "the authority under the Constitution" to determine that the Geneva Convention does not apply to the conflict in Afghanistan, but that he will "decline to exercise that authority at this time." In accordance with the position of the Department of Justice, he determines that the Geneva Convention on the Treatment of Prisoners of War does not apply to members of the Taliban and al Qaeda.

[redacted] UNCLASSIFIED

THE WHITE HOUSE

WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to

NSC DECLASSIFICATION REVIEW [E.O. 12958 as amended]
DECLASSIFIED IN FULL ON 6/17/2004
by R.Soubers

[redacted]
Reason: 1.5 (d)
Declassify on: 02/07/12

[redacted]





exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

[redacted]

**February 22, 2002**

**Memorandum From: Under Secretary for International Affairs, John B. Taylor**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: O'Neill's Upcoming Trip to Africa**

February 22, 2002

**MEMORANDUM FOR SECRETARY O'NEILL**

**FROM** John B. Taylor, Under Secretary for International Affairs

**SUBJECT:** Trip to the EBRD Meetings, Africa and the AfDB Meetings

**ATTACHMENTS:** **Tab A** – Trip Overview
**Tab B** – Annotated Agenda, EBRD Visit
**Tab C** – Annotated Agenda, Africa Visit

Attached is a notional travel schedule for your trip to the EBRD annual meetings and then onwards to Africa and the AFDB meetings. The trip is scheduled to last from Sunday evening, May 19 until early Thursday morning, May 30.

**EBRD Annual Meetings (Bucharest).** We suggest you arrive early in the morning on May 20, the second day of the two-day meetings. Your attendance will give the USG an opportunity to deliver a strong, public message regarding the EBRD's role in supporting the challenges of transition economies in Central and Eastern Europe, the Baltics and the CIS. The EBRD was created in 1991 to support transition to market-oriented economies in this region, and has a strong private-sector orientation: roughly 75% of its portfolio is invested in private sector projects. However, investment climate reform is lagging in most countries and corruption and over-regulation remain major impediments to private sector development.

In this context, the EBRD annual meeting would be an ideal opportunity to highlight some of our recent thinking on how to more effectively use IFI tools to improve business climates and strengthen firm and bank capacity and transparency. In addition, the EBRD has mobilized substantial financing to support the development of small and medium-sized enterprises (SMEs) in the region, which have been critical to stimulating entrepreneurship, employment and sustainable growth. In fact, the U.S. has played a key role in establishing special funds targeted at SMEs in Russia and the Balkans. Your participation at this meeting would enable you to highlight this particularly successful element of the EBRD's activities, which we would like to replicate elsewhere. The last time a Secretary of the Treasury visited the EBRD Annual Meetings was in 1992, when Nicholas Brady attended.

You will have the opportunity to make a speech outlining U.S. policy goals, meet with EBRD President Lemierre and senior officials, make one or two project site visits, meet with U.S. business representatives operating in the region, and conduct several country bilateral meetings.

**Africa.** We propose that you depart late in the evening Monday, May 20 for Africa. You would visit Ghana, South Africa, Uganda, and Ethiopia. The trip will allow you to conduct

meetings and make site visits related to some of our major themes and policy goals in Africa including raising productivity, making aid more effective and accountable, expanding the scope for private sector activity, increasing investment in education and health, and stimulating more effective action to deal with the HIV/AIDS crisis. You would end your tour at the African Development Bank Annual Meetings in Addis Ababa, providing an opportunity to deliver a major speech highlighting conclusions from the trip and presenting the Administration's views on development and MDB reform. This meeting is the most important annual gathering of top economic and financial players, private and public, in Africa. It offers an unmatched forum for presenting our ideas.

We propose that the trip focus on countries that have made substantial commitments to promoting market-led growth and improving productivity and living standards. Your trip will highlight their progress and encourage them to continue to be models for the region. Of the countries recommended, Uganda was the first to reach a completion point under the enhanced HIPC initiative, Ghana reached a decision point on February 22, 2001 and Ethiopia is emerging from conflict. No Treasury Secretary ever has visited Ghana, Uganda, or Ethiopia.

You would meet various officials, including Presidents, and visit health and education centers, World Bank/African Development Bank/USAID projects, factories and other private enterprises, and customs facilities. We understand that Bono will join you for part of the trip, and we are working with his staff on logistical arrangements. We are also working with the press office to coordinate the appropriate message and press strategy for the trip.

You need nine days to cover the Africa portion of this itinerary, including travel time. This includes time for you and your family to visit a game park, probably Pilanesberg Park in South Africa, on Saturday afternoon May 25 and Sunday May 26.

**AfDB Meeting.** You would deliver the US Governor's speech early Wednesday morning, May 29 -- the second day of the plenary. We also recommend that you schedule a breakfast meeting with AFDB President Kabbaj and meet with some of the Bank's best working level officers to discuss development effectiveness, what is working and how such results are measured. Meetings with private business representatives should also be considered. Finally, it might be useful to conduct a few bilaterals with ministers from countries you will not be visiting, as well as courtesy calls on Prime Minister Meles and other members of the host government.

**TAB A**

## NOTIONAL SCHEDULE
## US-Bucharest-Uganda-Ghana-SAF-Ethiopia

**Sunday, May 19**

7:00 pm — Depart Andrews AFB for Bucharest, Romania

**Monday, May 20**

6 am. — Arr. Bucharest; EBRD meetings
11 pm — Dep. for Ghana

**Tuesday, May 21**

6 am — Arr. Accra

**Wednesday, May 22**

11 pm — Dep for Uganda (Flight time 5-1/2 hrs, +2 hrs. change)

**Thursday, May 23**

6:30 am — Arr. Entebbe
7:30 am — Arr. Kampala

**Friday, May 24**

In Uganda

**Saturday, May 25**

5 am — Dep. Kampala
6 am — Dep. Entebbe for South Africa (Flight time 5-1/2 hours)
11:30 am — Arr. Pretoria/Jo'burg
12 noon — Dep. Pretoria for Pilanesberg Park (Drive time 3 hours)

**Sunday, May 26**

11:00 am — Dep Pilanesberg Park for Pretoria.
1:30pm — Arr. Pretoria

**Monday, May 27 (Memorial Day)**

In So. Africa

**Tuesday, May 28**

3:00 pm — Dep. Pretoria/Jo'burg
10:30 pm — Arr. Addis Ababa, Ethiopia for AfDB Annual Meetings

**Wednesday, May 29**

6 pm — Dep. Addis Ababa

**Thursday, May 30**

9 am — Arr. Andrews AFB

**TAB B**

## ANNOTATED SCHEDULE
## ROMANIA/EBRD

**Monday, May 20**

| | |
|---|---|
| TBA | Arrive Bucharest (or late Sunday) |
| 8:00-9:00 am | (1) Breakfast speech to US businesses (sponsored by Business Council for International Understanding) *or* |
| | (2) Participate in Market Breakfast (investment bankers working in region) |
| 9:30-9:45 am | U.S. Governor's Speech |
| 10:00-12:45 pm | Country Bilaterals: Romania and FRY |

We recommend meeting with the FRY because its economic team has pursued a bold reform path, implementing politically unpopular measures (such as closing five large state banks, raising energy prices and launching an ambitious privatization program) in order to get the economy on a sustainable footing and build credibility with the international community;

As host of the annual meetings, Secretary O'Neill would be expected to meet with the Romanian President and Prime Minister; theme could be use of lessons from other parts of the world to motivate Romania to set much higher goals for the pace and scope of reform.

| | |
|---|---|
| 1:00-2:30 pm | Governors' Lunch |
| 3:00-6:00 pm | Site Visits |

**Option 1** - Ploiesti - Prahova County
Ploiesti and Prahova County are a success story for Romania and U.S. investment. About a 30-40 minute drive from Bucharest, the Mayor, County and Federal officials have worked together to develop the city, county, and its infrastructure while attracting significant foreign. During a 3-4 hour visit the Secretary could meet with local officials and visit 1-2 facilities.

**Option 2 - Titan** - A high tech machine shop located in Bucharest. The plant was split into sections and privatized in 1999, with some of its assets acquired by Wisconsin Machine Tools, a major U.S. investor in Romania.

**Option 3** - Cisco Systems Academy - An innovative distance learning center teaching IT and networking skills to young Romanians.

**Option 4** - Telemobil/Qualcomm/Lucent Technologies is introducing third generation CDMA technology to Europe through its $300 million investment in Romania. A Secretarial visit would give visibility to this cutting edge project that has huge growth potential in Romania and the rest of Europe.

**Option 5** - SECI Crime Center. The U.S., Europe and Balkan countries have together established a Crime Center in Bucharest to fight crime, in particular, transnational criminal groups and crimes that involve the smuggling of goods and people. The Center is working to facilitate the apprehension and speedy prosecution of criminals by coordinating their activities and crime fighting strategies. In recent months, the SECI Crime Center has also functioned as a distribution point for intelligence requests related to terrorist financing. As a result of these requests, suspicious accounts and transactions were discovered in Bosnia-Herzegovina and Albania.

7:00-9:00 pm Dinner with EBRD President Lemierre

Topics could include a new MDB private sector initiative that would draw upon EBRD's successes, how to increase private sector activity in Central Asia and the Caucasus, EBRD's role in promoting Russian private banking sector and a strategy for securing financing from other donors for the Russia Small Business Fund.

11:00 pm Depart Bucharest for Ghana

**TAB C**

**ANNOTATED SCHEDULE**
**AFRICA and AfDB**

**Monday, May 20**

| | |
|---|---|
| 11:00 pm | Depart Bucharest for Ghana |

**Tuesday, May 21**

| | |
|---|---|
| 6:00 am | Arrive Accra, Ghana |
| 7:00 am | Check into Hotel |
| 9-11:00 am | Meet with President Kufuor, Finance Minister, |
| 11:30 am | Visit ACS BPS (US-owned data processing firm.) |
| 1:00 pm | Dinner with Parliamentarians |
| 2:30 pm | Meet with Central Bank Governor |
| 3:30 pm | Leave for Heinz Tuna packing plant |
| 5:30 pm | Leave Tuna plant |
| 7:00 pm | Hotel |
| 8:00 pm | Dinner with Business community (local and international) hosted by Ambassador |

**Wednesday, May 22**

| | |
|---|---|
| 8:00 am | Breakfast with Ambassador |
| 9:00 am | Leave for AFDB project |
| 9:30 am | AFDB Alley Project (Community Project) |
| 10:15 am | Depart AFDB project |
| 11:00 am | Radio Show |

| | |
|---|---|
| 1:00 pm | Lunch with NGOs |
| 3:00 pm | Visit to an Education project (WB or USAID) |
| 5:00 pm | Visit Tema Oil Refinery |
| 7:00 pm | Dinner |
| 10:00 pm | depart Accra for Uganda (5-1/2 hour flight, time change +1 hours) |

**Thursday, May 23 (will have Bono here)**

| | |
|---|---|
| 6:00 am | Arrive Entebbe |
| 7:00 am | Arrive Kampala at Hotel |
| 9:00 am | Breakfast with Ambassador |
| 10:00 am | Leave for visit to Cut Flowers factory (travel time 3 hrs roundtrip) |
| 11:30 pm | Cut Flowers |
| 1:00 pm | Leave cut flowers |
| 3:00 pm | Meet with President Museveni and Finance Minister |
| 4:30 pm | Visit to hospital (AFDB project), including TASO AIDs Clinic (part of hospital complex). |
| 6:00 pm | PRESS |
| 7:00 pm | Hotel |
| 8:00 pm | Dinner with Business Community (hosted by the Ambassador) |
| 4:30 pm | Visit IAVI project (clinical trials) |

**Friday, May 24**

| | |
|---|---|
| 8:00 am | Breakfast with Central Bank Governor |
| 9:30 am | Site visit to microfinance project, escorted by FINCA officers. |

| | |
|---|---|
| 11:00 am | Roundtable discussion with Makerere University economists, possibly including private sector representatives, on problems of promoting development and growth. |
| 1:00 pm | Lunch with NGO's |
| 3:00 pm | Visit Education Project |
| 4:30 pm | IAVI project – public/private partnership (Gates Foundation) |
| 6:00 pm | Press – Radio/TV show |
| 8:00 pm | Dinner with select NGO's and private sector |

**Saturday, May 25**

| | |
|---|---|
| 5:00 am | Depart for Entebbe |
| 6:00 am | Wheels up for South Africa (flight time 5 ½ hours) |
| 11:30 am | Arrive Jo'burg/Pretoria |
| 12:00 pm | Leave for Pilanesburg Park, Drive time 3 hours. |

**Sunday, May 26**

| | |
|---|---|
| 1:00 pm | Leave Pilanesburg Park for Pretoria |
| 5:00 pm | Hotel |
| 7:00 pm | Dinner with Private Sector at Ambassador's residence |

**Monday, May 27**

| | |
|---|---|
| 8:00 am | Breakfast with Finance Minister Manuel |
| 9:30 am | Courtesy call on President Mbeki |
| 10:30 am | Call on Central Bank Governor Mboweni |
| 12:00 pm | Depart for Soweto |
| 1:30 pm | Education site visit (lunch in car) |
| 2:00 pm | Meet with educators |

| | |
|---|---|
| 3:30 pm | Depart for site visit to Ford auto plant in Pretoria. |
| 4:30 pm | Visit Ford production line, view model corporate HIV/AIDS program |
| 6:00 pm | Return to Hotel |
| 8 pm | Dinner with SACOB, black chamber of commerce |

**Tuesday, May 28**

| | |
|---|---|
| 9:00 am | Breakfast with domestic/foreign financial community at Jo'burg Stock Exchange; discuss microfinance, tracking terrorist financing, etc. |
| 11:00 am | Press conference/television interview |
| 3:00 pm | Depart Jo'burg for Addis Ababa, Ethiopia (flight time 7 ½ hours) |
| 10:30 pm | Arrive Addis Ababa, Ethiopia |

**Wednesday, May 29**

| | |
|---|---|
| 8:00 am | Breakfast with AFDB President Kabbaj and Chairman of Board of Governors, Ethiopian Finance Minister Sufian |
| 9:30 am | Governor's Speech |
| 10:30 – 12:30 | Bilaterals |
| 1:00 pm | Lunch with Business Community |
| 3:00 pm | Courtesy call on Prime Minister Meles |
| 4:00 pm | Site visit |
| 6:00 pm | Depart Addis. |

**Thursday, May 30**

| | |
|---|---|
| 7 am | Arr. Andrews AFB |

February 26, 2002

Department of Justice Memorandum

From: , Assistant Attorney General Jay S. Bybee
To: Defense Department General Counsel William J. Haynes II

Re: Constitutional issues related to detainees from the Afghanistan conflict and constraints on interrogation .

Office of the Assistant Attorney General

*Washington, D.C. 20530*

February 26, 2002

MEMORANDUM FOR WILLIAM J. HAYNES, II
GENERAL COUNSEL, DEPARTMENT OF DEFENSE

*Re: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan*

You have asked a series of questions concerning legal constraints that may potentially apply to interrogation of persons captured in Afghanistan. Several of the issues you have raised relate to the applicability of the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), to interrogations that may be conducted for various purposes (and by various personnel) ranging from obtaining intelligence for military operations and force protection to investigating crimes with a view to bringing subsequent prosecutions. As explained below, the Self-Incrimination Clause of the Fifth Amendment, as interpreted by the Supreme Court in *Miranda*, provides a trial right in a criminal prosecution before U.S. courts and governs the admissibility of statements made by the defendant in a custodial interrogation. The issue of the applicability of *Miranda* and restrictions it may place on conduct in interrogations, therefore, is best addressed in the context of the subsequent use that is made of statements obtained in custodial interrogation.

As we explain below, the Self-Incrimination Clause (and hence *Miranda)* does not apply in the context of a trial by military commission for violations of the laws of war. Accordingly, military commissions may admit statements made by a defendant in a custodial interrogation conducted without *Miranda* warnings. Therefore, to the extent that the only trial-related use of statements obtained in an interrogation will be before a military commission, there is no need to provide *Miranda* warnings.

As we understand it, the inquiry cannot end there because decisions have not yet been made concerning whether individuals being interrogated will be prosecuted and if so in what forum charges will be brought. The possibility still exists that some detainees may be prosecuted on criminal charges in Article III courts. Thus, you have asked how Article III courts may treat statements obtained in various scenarios without *Miranda* warnings and whether *Miranda* warnings should be given as a prudential matter to preserve the possibility of using statements in a criminal trial. Although unwarned statements made in the course of custodial interrogation by law enforcement officers are generally presumed to be compelled under *Miranda*, thereby rendering them inadmissible in criminal prosecutions before domestic courts, *Miranda* does not provide an iron-clad rule governing the voluntariness of all custodial statements. *Miranda* was designed to provide a constitutional rule of conduct to regulate the practices of law enforcement, and where its deterrent rationale does not apply, the Supreme Court has not extended it. Many of the interrogations in question here, which will be conducted for purposes of obtaining information for military operations

and intelligence purposes, do not come within the rationale of *Miranda*. In addition, one of the specific exceptions to *Miranda* that the Supreme Court has crafted should extend, by a close analogy, to some of the interrogations contemplated here. We divide our discussion to address four categories of statements the United States may wish to admit into evidence in a subsequent criminal prosecution: (1) statements arising out of interrogation conducted by military and intelligence personnel to develop military operations and intelligence information; (2) statements obtained for criminal law enforcement purposes, whether by FBI interrogators or military personnel; (3) statements obtained in the course of a war crimes investigation by members of the criminal investigative services of one of the U.S. Armed Forces; and (4) statements obtained where the objectives of the questioning may be mixed, and the interrogation thus may not fall squarely into only one of the first three categories.

We conclude that the first category of statements is likely to be admissible in an Article III trial even if the statements are obtained without *Miranda* warnings. Statements from the second category are likely to be inadmissible if they arise from unwarned interrogation. There is a substantial risk that courts will apply *Miranda* to the third category as well. Finally, in the fourth category – where the objectives of the questioning may be mixed – results may be highly fact-dependent, but we believe that the subjective motivations of interrogators in pursuing particular questions should not alter the conclusion that an interrogation conducted for obtaining military and intelligence information should not require *Miranda* warnings.

We also explain that, even after statements are obtained in an unwarned custodial interrogation governed by *Miranda*, any subsequent, *Mirandized* confessions would be admissible in an Article III court, at least so long as any prior, unwarned interrogation did not involve coercion, or where there was an adequate break in events between any coercion and the subsequent, properly *Mirandized* interrogation.

Finally, in response to your other inquiries, we explain that the Sixth Amendment right to counsel does not apply prior to the initiation of adversary judicial criminal proceedings, and thus is not likely to apply to persons seized in Afghanistan and held overseas. In addition, the Citizens Protection Act, 28 U.S.C. § 530B (Supp. IV 1998), commonly known as the McDade Act – which places restrictions on government attorneys' conduct with respect to interrogations – does not apply to Defense Department lawyers.

## I. The Self-Incrimination Clause Provides a Trial Right.

As the Supreme Court has explained, the Self-Incrimination Clause of the Fifth Amendment, on which the *Miranda* decision is premised, is a "trial right of criminal defendants." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). The clause provides that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself." U.S. Const. amend. V (emphasis added). "The Amendment has its roots in the Framers' belief that a system of justice in which the focus is on the extraction of proof of guilt from the defendant himself is often an adjunct to tyranny and may lead to the conviction of innocent persons. Thus, a violation of the constitutional guarantee

occurs when one is 'compelled' by governmental coercion to bear witness against oneself in the criminal process." *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring).

The protection of the Self-Incrimination Clause is not limited, however, to statements compelled during the course of a court proceeding. Rather, it extends to prior statements subsequently introduced into evidence at a court proceeding. Beginning with *Bram v. United States*, 168 U.S. 532 (1897), the Supreme Court has held that the Clause bars the introduction in federal cases of involuntary confessions made during certain forms of custodial interrogation. *See also Withrow v. Williams*, 507 U.S. 680, 688 (1993). In *Miranda*, the Court held that the privilege against self-incrimination prohibits the admission into evidence of statements given by a suspect to the police during custodial interrogation unless a prior warning has been given advising the defendant of his rights. *See* 384 U.S. 436 (1966); *see also Illinois v. Perkins*, 496 U.S. 292, 296 (1990); *Duckworth*, 492 U.S. at 201 (in *Miranda*, "the Court established certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation"). The Court in *Miranda* "presumed that interrogation in certain custodial circumstances is inherently coercive and . . . that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forego those rights." *New York v. Quarles*, 467 U.S. 649, 654 (1984) (footnote omitted). In the years since first announcing the *Miranda* presumption, the Supreme Court has "frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated [in *Miranda*], his responses cannot be introduced into evidence to establish his guilt." *Berkemer v. McCarthy*, 468 U.S. 420, 429 (1984).

It bears repeating that the *Miranda* presumption is premised on the "*trial right* of criminal defendants" provided by the Self-Incrimination Clause. *Verdugo-Urquidez*, 494 U.S. at 264 (emphasis added). The "sole concern" of that Clause, the Supreme Court has explained, is "insur[ing] that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar v. United States*, 406 U.S. 441, 453 (1972). Thus, "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs *only at trial*." *Verdugo-Urquidez*, 494 U.S. at 264 (emphasis added).[1] Thus, neither the Self-Incrimination Clause nor *Miranda* established a free-floating code of conduct regulating the manner in which agents of the federal government may conduct interrogations in any and all circumstances. In other words, neither the Self-Incrimination Clause nor *Miranda* prohibits an unwarned custodial interrogation as a constitutional violation *in itself*. Accordingly, it confuses analysis somewhat to speak in terms of an FBI or military interrogator "violating" *Miranda* or the Fifth Amendment simply by conducting an unwarned custodial interrogation. Whether or not *Miranda* applies to a given circumstance or requires warnings can only be assessed in view of the use the government makes of statements

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[1] *See also Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 346 (2d Cir. 1998) ("Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding."); *United States v. Yunis*, 859 F.2d 953, 970 (D.C. Cir. 1988) (Mikva, J., concurring specially) ("[T]he focus of the fifth amendment protection continues to be the *use* of compelled, self-incriminatory evidence against the defendant at trial.").

obtained in the interrogation. If the government never uses the statement in a criminal prosecution where the Self-Incrimination Clause applies, no question of a *Miranda* "violation" can ever arise. *See Quarles*, 467 U.S. at 686 (Marshall, J., dissenting) ("[T]he police are free to interrogate suspects without advising them of their constitutional rights. . . . All the Fifth Amendment forbids is the introduction of coerced statements at trial.").

In addition, in addressing the scope of proper application of the *Miranda* warnings, it is critical to bear in mind that the Supreme Court has made clear – both in *Miranda* and in subsequent decisions – that the purpose of the *Miranda* rule is to provide a rule of conduct for law enforcement officers to prevent practices that might lead to defendants making involuntary statements. As the Court put it in *Miranda*, its goal was to set out "concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U.S. at 442. The Court has not treated *Miranda* as establishing an immutable rule that *any* statement made in any unwarned, custodial interrogation is necessarily involuntary under the Fifth Amendment and cannot be admitted at trial. Rather, in circumstances where the purpose of regulating the conduct of law enforcement officers would not be served, or is outweighed by other considerations, the Court has consistently declined to require that the *Miranda* procedures be followed in order for a custodial statement to be deemed admissible. For example, in *New York v. Quarles*, the Court held that when the police arrest a suspect under circumstances presenting an imminent danger to the public safety, they may, without informing him of his *Miranda* rights, ask questions necessary to elicit information that would neutralize the threat. The Court concluded that in such circumstances, the need to ensure public safety outweighed any benefit that might be gained from the ordinary rule of requiring *Miranda* warnings. 467 U.S. at 657. Similarly, in *Harris v. New York*, 401 U.S. 222 (1971), the Court sanctioned the use of statements obtained without *Miranda* warnings for purposes of impeaching a defendant upon cross-examination. Again, the Court explained that the goal of shaping the conduct of law enforcement officers did not require extending *Miranda* to exclude the use of unwarned statements for purposes of cross examination: "Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* at 225.

As explained in more detail below, moreover, the Court's decisions limiting *Miranda* to circumstances where the purposes of *Miranda*'s judicially crafted code of conduct would be served have not been undermined by the recent pronouncement that *Miranda* states a constitutional requirement. *See Dickerson v. United States*, 530 U.S. 428 (2000). The *Dickerson* Court did not suggest that *Miranda* warnings are an absolute prerequisite for any custodial statement to be voluntary under the Fifth Amendment and that any statement obtained without the warnings is necessarily inadmissible. Rather, *Dickerson* expressly endorsed past decisions such as *Quarles* and *Harris* that made exceptions to the requirements of *Miranda* warnings and explained that they simply "illustrate the principle . . . that no constitutional rule is immutable." *Id.* at 441.

## II. Trials by Military Commissions.

The Self-Incrimination Clause does not apply to trials by military commissions for violations

of the laws of war. The Clause is limited by its terms to "any criminal case," U.S. Const., amend. V, and the Supreme Court has long understood the rights guaranteed by the amendment to be limited to the scope they had at common law in criminal prosecutions at the time of the founding. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1, 39-40 (1942); *Ex parte Wilson*, 114 U.S. 417, 423 (1885) ("The Fifth Amendment, declaring in what cases a grand jury should be necessary, . . . in effect, affirm[ed] the rule of the common law upon the same subject."). In *Quirin*, the Court concluded that a trial by military commission for violations of the laws of war was not a criminal prosecution that required a grand jury indictment at common law and thus expressly held that the Fifth Amendment's requirement of indictment by grand jury does not apply to military commissions. *See Quirin*, 317 U.S. at 40. *See also Application of Yamashita*, 327 U.S. 1 (1946). Under the same reasoning, the Self-Incrimination Clause also does not constrain the evidence that military commissions may receive. Trials by military commissions are not "criminal case[s]" within the terms of the Amendment. Rather, they are entirely creatures of the President's authority as Commander in Chief under Article II and are part and parcel of the conduct of a military campaign.[2] As a result, they are not constrained by the strictures placed on "criminal case[s]" by the Self-Incrimination Clause (or other provisions in the Bill of Rights). As the *Quirin* Court stated broadly (albeit in *dicta*), "the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission." 317 U.S. at 45. *Cf. Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870) ("the war powers of the government . . . are not affected by the restrictions imposed by the fifth and sixth amendments").

Accordingly, incriminating statements may be admitted in proceedings before military commissions even if the interrogating officers do not abide by the requirements of *Miranda*. *Cf. United States v. Bin Laden*, 132 F. Supp. 2d 168, 181, 182 n.10 (S.D.N.Y. 2001) (distinguishing, for purposes of application of the Fifth Amendment, "proceeding[s]" against "'subject[s] of a foreign state at war with the United States'" and "operated pursuant to a temporary military commission specially constituted under the authority of the Joint Chiefs of Staff" from criminal trials before Article III courts (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 769 n.2 (1950))); *id.* at 189 ("*Miranda* only prevents an unwarned or involuntary statement from being used as evidence in a domestic criminal trial").[3]

Moreover, with respect to trials of foreign nationals conducted outside U.S. territory, our conclusion is additionally supported by the well-established fact that the Fifth Amendment does not

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[2] *See* Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001).

[3] *Cf. also* Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10*, at 59 (William S. Hein & Co., Inc. 1997) (1949) (although "interrogations . . . were carried out in a thoroughly humane fashion, and no objectionable means were used to elicit information from those who were questioned," "[t]hey were not carried out in the manner of 'pre-trial interrogations' as known to American courts, and it would never have occurred to the interrogators, for example, to warn the individual being questioned that anything he said 'might be used against him.'").

confer rights upon aliens outside the sovereign territory of the United States. *See Verdugo-Urquidez*, 494 U.S. at 269 ("we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States"); *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950) (finding "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses"); *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . ."). Accordingly, U.S. military tribunals convened abroad are not required to grant aliens rights under the Self-Incrimination Clause.

## III. Criminal Trials Before Article III Courts.

Although the Self-Incrimination Clause of the Fifth Amendment does not confer rights upon aliens *outside* the sovereign territory of the United States, no issue of extraterritoriality would be involved if aliens were brought *into* the United States for trial in an Article III court. As the Supreme Court has explained, "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants." *Verdugo-Urquidez*, 494 U.S. at 264. Any violation of the right would occur at the trial conducted here in the United States when statements made by the accused were offered into evidence.

The Supreme Court has never squarely held that the Self-Incrimination Clause applies in the criminal trial of an alien whose only connections to the United States consist of an attack on the country followed by his arrest overseas and transportation to the United States to stand trial. The United States, moreover, has recently argued in at least one case that the Self-Incrimination Clause does not apply in such a trial. *See Bin Laden*, 132 F. Supp. 2d at 181 & n.8.[4]

As a matter of original interpretation of the Fifth Amendment, there may be sound reasons for concluding that the Self-Incrimination Clause does not apply to a trial of an alien whose only connections to this country consist of the commission of a federal crime (perhaps taking place entirely abroad) and involuntary transportation to this country to stand trial. The Clause states: "nor shall any person . . . be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In extending this right to "any person," the Framers may have intended to encompass only a limited class of "person[s]" who could claim the protections of the Constitution. Some support for this interpretation can be found in the analysis the Supreme Court has applied in holding that the Fifth Amendment does not apply extraterritorially. In *Johnson v. Eisentrager*, the Court

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[4] It appears that in other cases involving similar fact patterns the United States has not contested the application of the Fifth and Sixth Amendments. *See, e.g., Yunis*, 859 F.2d at 957 ("The parties have stipulated that Yunis, despite his alien status, can claim the protection of the fifth amendment to the American Constitution for interrogation that occurred outside the territory of the United States."). *Cf. also United States v. Yousef*, 925 F. Supp. 1063 (S.D.N.Y. 1996) (denying motion to suppress statement made on airplane from Pakistan to United States, because defendant had validly waived *Miranda* rights); *United States v. Noriega*, 746 F. Supp. 1506, 1529-32 (S.D. Fla. 1990) (rejecting motion to dismiss indictment on grounds that American invasion of Panama violated Due Process Clause, because alleged violations of rights involved only third parties and not Noriega himself).

made clear that the terms of the amendment cannot be read literally to confer rights on "any person" – a reading that would include aliens overseas who had no connection whatsoever to the United States. As Justice Kennedy summarized in *Verdugo-Urquidez*, "the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." 494 U.S. at 275 (Kennedy, J., concurring). In describing the limitations on the class of "person[s]" to whom the Fifth Amendment extends, the Court explained that the alien "has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Eisentrager*, 339 U.S. at 770. Arguably, an alien whose only connection with the United States is an attack upon the country (or its citizens) followed by his arrest overseas and transportation to the United States to stand trial has not established any sort of connection with the country that warrants allowing him the protections of the Fifth Amendment.

Nevertheless, whatever the merits of such an interpretation as an original matter, we understand that your inquiry concerns the likely treatment of the Self-Incrimination Clause given the current state of the Supreme Court's jurisprudence. Approaching the question on that basis, we believe that the Supreme Court's analysis in prior decisions points to the conclusion that the Self-Incrimination Clause would likely be applied in a criminal trial of an alien in the United States even if the alien had no previous connection to this country. That is because the Court's decisions generally reflect a view that any criminal prosecution within the territorial boundaries of the United States is constrained by the requirements of the Fifth Amendment. Even in *Eisentrager*, for example, the Court's analysis centered repeatedly on the absence of the aliens in question from the territorial jurisdiction of the United States. *See* 339 U.S. at 769-78; *id.* at 771 ("[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the *alien's presence within the territorial jurisdiction* that gave the Judiciary power to act.") (emphasis added).

More importantly, in *Wong Wing v. United States*, 163 U.S. 228 (1896), the Court long ago concluded that the Fifth Amendment rights to grand jury indictment and due process applied to aliens subject to criminal punishment within the United States, *see id.* at 238. The Court's textual analysis of the Amendment focused on its broad terms guaranteeing that no "person" should be subject to certain treatments and concluded that it should have broad application covering all persons. Thus, the Court first noted that the Fourteenth Amendment's Due Process and Equal Protection Clauses, like the Fifth Amendment, speak in terms of rights guaranteed to "any person." *See id.* The Court explained that "[t]hese provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality." *Id.* It concluded that "[a]pplying this reasoning to the fifth and sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guarantied by those amendments." *Id.*

On its face, the analysis in *Wong Wing* was not limited to aliens who had established particular connections with this country. To the contrary, the Court framed its reasoning in terms applicable to aliens who had established no ties to the country because they had never effected a

lawful entry into the United States. It thus contrasted Congress's power to "forbid aliens or classes of aliens from" entering the country with its power to subject "such aliens to infamous punishment at hard labor," which could be done only through "a judicial trial to establish the guilt of the accused." *Id.* at 237. Similarly, in one of the decisions marking the most restrictive view of the extraterritorial application of the Constitution – denying its application even to citizens abroad – the Court has stated in *dicta* that the constitutional guarantees in the Fifth and Sixth Amendments "apply only to citizens and others within the United States, *or who are brought there for trial for alleged offenses committed elsewhere.*" *Ross v. McIntyre*, 140 U.S. 453, 464 (1891) (emphasis added). Taking a similar territorial approach, the Court has held that the Fifth Amendment's Due Process Clause applies to aliens even if their "presence in this country is unlawful, involuntary, or transitory." *Matthews v. Diaz*, 426 U.S. 67, 77 (1976).[5]

To be sure, in *Verdugo-Urquidez* the Court stated that *Wong Wing* addressed "resident aliens" and thus the decision cannot avail "an alien who has had no previous significant voluntary connection with the United States." 494 U.S. at 271. *See also id.* ("These cases, however [including *Wong Wing*], establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."). Despite that characterization, however, as noted above the analysis in *Wong Wing* did not distinguish between resident aliens and other aliens, and in subsequent cases since *Verdugo-Urquidez* the Court has described the decision in broader terms – terms consistent with the view that the Self-Incrimination Clause would apply to criminal trials of any aliens in the United States. *See Zadvydas v. Davis*, 121 S. Ct. 2491, 2501 (*Wong Wing* held that "all persons within the territory of the United States are entitled to the protection" of the Fifth Amendment, noting that decisions limiting application of constitutional rights to aliens "rested upon a basic territorial distinction"); *see also id.* at 2506 (Scalia, J., joined by Thomas, J., dissenting) (suggesting that *Wong Wing* draws no distinction between "aliens arrested and detained at the border" before entry and those already within the country).

The analysis in *Verdugo-Urquidez* itself, moreover, on balance tends to suggest that the present Court would be inclined to reach the same conclusion. *Verdugo-Urquidez* involved the application of the Fourth Amendment to searches and seizures conducted by U.S. law enforcement personnel on an alien's property outside the United States. In approaching that issue, the Court framed its entire analysis by first distinguishing the Fifth Amendment and explaining that the Fourth Amendment "operates in a different manner than the Fifth Amendment, which is not at issue in this case." 494 U.S. at 264. The Fifth Amendment, the Court emphasized, provides a "fundamental trial

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[5] It bears mention that in the immigration context the Court has developed a doctrine known as the "entry fiction" under which an alien who is detained at the border, even though physically present within the boundaries of the United States, is deemed legally not to have entered the United States. As a result, the alien does not possess constitutional protections that would attach upon entry. *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). It might be argued that an alien whose only presence in the country consists of his transportation here for trial similarly should be treated legally as lacking any presence sufficient to confer rights. Given the analysis outlined in text, we cannot predict that such an argument is likely to prevail. The one circuit court that has addressed the issue has rejected such an approach. *See United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979).

right," rather than directly regulating the conduct of police prior to trial. *Id.* In addition, the Court based its analysis largely on the particular terms of the Fourth Amendment, which limit the right it describes to "the people." *Id.* The Court emphasized that this limitation "contrasts with the words 'person' and 'accused' used in the Fifth and Sixth Amendments regulating procedure in criminal cases," thus suggesting that the procedure in criminal cases (within the United States) would be the same for all persons. *Id.* at 265-66. *See also id.* at 265 (the Fourth Amendment "*by contrast with the Fifth and Sixth Amendments*, extends its reach only to 'the people'") (emphasis added); *id.* at 269 (noting that the Fifth Amendment "speaks in the relatively universal term of 'person'"). Justice Kennedy, moreover, who provided the fifth vote for the majority, also wrote separately and noted that, where the "United States is prosecuting a foreign national in a court established under Article III, . . . all of the trial proceedings are governed by the Constitution." *Id.* at 278 (Kennedy, J., concurring). Given the Court's explicit acknowledgment of the textual differences between the Fourth Amendment and the Fifth Amendment, we think that *Verdugo-Urquidez* does not provide strong support for the claim that the Fifth Amendment does not apply to the trial in the United States of an alien who has no previous connections with this country.

Finally, it bears noting that the Court has consistently described the Self-Incrimination Clause as a fundamental trial right that is critical for protecting the integrity of the trial process. At times the Court has suggested that the Clause plays a critical role in ensuring the reliability of confessions and thus protects the truth-finding function of a trial. *See, e.g., Application of Gault*, 387 U.S. 1, 47 (1967) ("The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth."); *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964) ("[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay. Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth.") (citation omitted). At other points the Court has stressed that the privilege is critical "to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'" *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415 (1966); *see also id.* at 416 ("[T]he Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth."). Under either rationale, the protection provided by the Clause is treated as critical for the integrity of the trial process itself. It thus seems likely that the Court would conclude that it applies in any criminal case, regardless of the status of the defendant as an alien.

Lower courts that have addressed the issue (albeit only in *dicta* in some cases) have concluded that the Self-Incrimination Clause does apply to trials of aliens, even if they have not established any connection with this country.[6]

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[6] *See United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979) (stating in *dicta* that "an alien who is within the territorial jurisdiction of this country, whether it be at the border or in the interior . . . is entitled to those protections guaranteed by the Fifth Amendment in criminal proceedings which would include the *Miranda* warning") (citation

The conclusion that the Self-Incrimination Clause will likely apply in any future trial, however, does not in itself answer the question how the decision in *Miranda* will apply. Under *Miranda*, evidence developed from custodial interrogation is not inflexibly presumed to be compelled, and thereby rendered inadmissible, simply because interrogators have neglected to provide the warnings outlined in *Miranda*. Not all custodial interrogation is subject to *Miranda*'s requirements. We address below four kinds of statements that the United States might wish to admit into evidence in an Article III trial: (1) statements arising out of interrogations intended to develop military operations and intelligence information; (2) statements obtained for criminal law enforcement purposes, whether by FBI interrogators or military personnel; (3) statements obtained in the course of a war crimes investigation by members of the criminal investigative services of one of the U.S. Armed Forces; and (4) statements obtained in an interrogation that may have mixed objectives and does not fall purely into only one of the previous categories. We conclude that the first category of evidence is likely to be admissible in an Article III trial even if *Miranda* warnings are not given. The second category of evidence is likely to be inadmissible unless the interrogators comply with *Miranda*. There is a substantial risk that courts will apply *Miranda* to the third category as well. Finally, for interrogations in the fourth category, results will likely turn on a highly fact-dependent inquiry.

### A. Questioning by military and intelligence personnel for military operations and intelligence information.

We conclude that statements obtained in the course of interrogation by military and intelligence personnel for purposes of gathering intelligence and military operations information need not satisfy *Miranda* standards in order to be admitted at an Article III criminal trial. Our conclusion is based on two separate, independent grounds. First, although *Miranda* establishes a presumption that statements made during unwarned custodial interrogation are involuntary, and thus inadmissible at trial under the Self-Incrimination Clause, *Miranda* and its progeny make clear that this presumption of involuntariness is not immutable or universally applicable. In particular, the Court has treated *Miranda* as a rule designed to guide the conduct of officials in law enforcement agencies and has repeatedly limited the reach of *Miranda*'s warning requirements based on the need for regulating the conduct of law enforcement officers. The fundamental objective of regulating that conduct has no application whatsoever in the context of interrogations of battlefield detainees for purposes of obtaining intelligence and military operations information. Under the reasoning that the Supreme Court has used to define the limits of *Miranda*, we conclude that interrogators engaged in such questioning need not give *Miranda* warnings to ensure that voluntary statements will be admissible in a later criminal trial. Second, we conclude that the established public-safety exception to *Miranda* should extend by analogy to interrogations of battlefield detainees for purposes of gathering intelligence and military operations information.

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omitted); *Jean v. Nelson*, 727 F.2d 957, 972-73 & n.22 (11th Cir. 1984) (*dicta*); *Bin Laden*, 132 F. Supp. 2d at 183 ("Fifth Amendment . . . protections seemingly apply with equal vigor to all defendants facing criminal prosecution at the hands of the United States, and without apparent regard to citizenship or community connection").

### 1. *Miranda's* deterrence rationale does not apply.

As previously explained, the Supreme Court crafted the requirements of *Miranda* as a means for implementing the protections of the Self-Incrimination Clause. In *Miranda*, the Court held that, because the environment in a custodial police interrogation "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," 384 U.S. at 467, confessions made during the course of such custodial interrogation are presumptively involuntary and, unless certain warnings are given to defuse the coerciveness of the environment, must be excluded at trial under the Self-Incrimination Clause. *See generally Dickerson v. United States*, 530 U.S. 428 (2000). If *Miranda* stated an immutable presumption concerning the voluntariness of custodial statements, it might well mean that in *any* custodial interrogation – even an interrogation of a battlefield detainee undertaken to obtain information for military operations – *Miranda* warnings would have to be given for any statements to be admissible at a later trial. Interrogation in the custody of the armed forces after capture on the battlefield might be considered at least as inherently coercive a scenario as questioning in custody at a police station. And if *Miranda* provided an absolute rule concerning the voluntariness of statements in such a custodial interrogation, it might be read to mean that statements obtained in a military interrogation could not be used in a subsequent criminal trial if the requisite warnings had not been given.

The Supreme Court, however, has never taken such an approach to *Miranda*. To the contrary, the Court has emphasized that the presumption crafted in *Miranda* and the warnings outlined there were intended to establish guidelines for the conduct of law enforcement officers pursuing criminal investigations. Although the purpose of the guidelines was to ensure the voluntariness of any statements obtained from custodial interrogations, the standards of conduct were not intended to set down an inflexible rule for evaluating voluntariness under the Fifth Amendment. The focus of *Miranda*, in other words, is not establishing a universally applicable (and constitutionally mandated) standard for measuring the voluntariness of statements made in any custodial situation. Rather, it is designed to provide rules of conduct specifically for the guidance of U.S. law enforcement officials – or, as the Court put it, "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda*, 384 U.S. at 442.[7] *See also Dickerson*, 530 U.S. at 434-35 (quoting same language from *Miranda*). Thus, the Supreme Court has repeatedly emphasized that the requirements of *Miranda* are designed to regulate the conduct of custodial interrogations arising out of criminal law enforcement investigations. The *Miranda* Court focused its concern on "police" interrogation and practices, and in later cases the Court has emphasized that the rationale behind *Miranda* is providing a "deterrent effect on proscribed police conduct." *Harris*, 401 U.S. at 225. Similarly, in *Thompson v. Keohane*, 516 U.S. 99 (1995), the Court described *Miranda* in terms of the requirements it imposed on "law enforcement officers." *Id.* at 107. *See also Quarles*, 467 U.S. at 656 ("The *Miranda* decision was based in large part on this Court's view that

[7] To the extent the Court has referred to *Miranda* as providing "concrete constitutional guidelines" for *courts* to follow, it seems clear that what is meant is guidelines for courts to follow in their role of deterring improper conduct by law enforcement through exclusion of evidence.

the warnings which it required police to give to suspects in custody would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation . . . ."); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices"); *Fare v. Michael C.*, 442 U.S. 707, 718 (1979) ("*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation . . . ."). When the Court has applied *Miranda* to interrogation by government officials other than law enforcement agents, it has done so based upon some finding of a nexus between the interrogation in question and criminal law enforcement. *See, e.g., Mathis v. United States*, 391 U.S. 1, 4 (1968) (applying *Miranda* to interview conducted by Internal Revenue Service agents with person in state custody largely upon basis that "tax investigations frequently lead to criminal prosecutions"); *Estelle v. Smith*, 451 U.S. 454, 466-69 (1981) (applying *Miranda* to court-ordered psychiatric examinations of criminal defendants); *United States v. Mata-Abundiz*, 717 F.2d 1277, 1279-80 (9th Cir. 1983) (applying *Miranda* to INS questioning of criminal suspect); *United States v. Gupta*, 183 F.3d 615, 617-18 (7th Cir. 1999) ("*Miranda* . . . is a mismatch for the immigration process, at least at the outset. . . . Much more difficult is the question when . . . the criminal investigation is far enough advanced [to trigger *Miranda*]."); *see also* 2 Wayne R. LaFave et al., Criminal Procedure § 6.10(c), at 622 (2d ed. 1999) ("[T]he courts have generally held that government agents not primarily charged with enforcement of the criminal law are under no obligation to comply with *Miranda*.").

Where the rationale of shaping the conduct of law enforcement officers does not apply or is outweighed by other considerations, the Court has consistently concluded that *Miranda*'s requirements do not apply and that statements obtained during custodial interrogation without *Miranda* warnings may still be introduced into evidence consistent with the Fifth Amendment's prohibition on compelled testimony. Thus, in *New York v. Quarles*, the Court concluded that where police need to obtain information critical for ensuring public safety, they need not provide *Miranda* warnings before initiating custodial questioning. 467 U.S. at 657-58. And in *Harris v. New York*, the Court concluded that *Miranda*'s purpose of providing a deterrent to regulate police conduct would be served sufficiently if un-*Mirandized* statements were excluded solely from the prosecution's case in chief, but were permitted for impeachment purposes on cross-examination. *See Harris*, 401 U.S. at 225 ("Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."). As the *Harris* Court explained, the benefits in terms of guiding conduct that would be derived from precluding the use of an unwarned statement upon cross-examination were too speculative and attenuated to outweigh the clear benefits that admitting the statements would provide in aiding "the jury in assessing [the defendant's] credibility." *Id.* The Court has thus demonstrated that the deterrent rationale behind *Miranda* limits the range of situations in which the case will be applied.

Similarly, drawing on the Supreme Court's analysis in *Miranda* and its progeny, lower courts have identified other situations where *Miranda*'s goal of shaping police conduct has no application and where *Miranda*'s warning requirements therefore do not apply. For example, federal courts have

repeatedly admitted unwarned custodial statements obtained by foreign police officers.[8] If *Miranda* provided an immutable rule that an unwarned statement made in custodial interrogation is necessarily involuntary, such statements would be absolutely barred from use at trial under the Self-Incrimination Clause, regardless of whether they were obtained by foreign police or anyone else. Such statements are admitted into evidence, however, because the rationale behind *Miranda* – shaping police conduct – does not apply to foreign police. Foreign police, of course, are not subject to the requirements of the federal Constitution,[9] and there is thus no basis for attempting to force them to comply with *Miranda*'s guidelines. Moreover, excluding statements obtained by foreign police without *Miranda* warnings would have no *practical* deterrent effect, because ensuring admissibility of evidence in U.S. courts is not a relevant incentive for police in another nation. As one court of appeals has explained,

> the United States Constitution cannot compel such specific, affirmative action by foreign sovereigns, so the policy of deterring so-called 'third degree' police tactics, which underlies the *Miranda* exclusionary rule, is inapposite to this case. Here the statements were not coerced, as revealed by testimony at the original trial which we have scrutinized. The evidence was therefore admissible.

*Kilday v. United States*, 481 F.2d 655 (5th Cir. 1973) (citations omitted).[10]

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[8] *See, e.g., United States v. Nagelberg*, 434 F.2d 585, 587 n. 1 (2nd Cir. 1970) ("The *Miranda* rule has no application . . . where the arrest and interrogation were by Canadian officers interested in Canadian narcotic and immigration offenses under their investigation. There is no showing that the statement was coerced or taken in violation of the laws of Canada. There is no claim of 'rubbing pepper in the eyes,' or other shocking conduct. The presence of an American officer should not destroy the usefulness of evidence legally obtained on the ground that methods of interrogation of another country, at least equally civilized, may vary from ours."); *United States v. Chavarria*, 443 F.2d 904, 905 (9th Cir. 1971) ("so long as the trustworthiness of the confession satisfies legal standards, the fact that the defendant was not given *Miranda* warnings before questioning by foreign police will not, by itself, render his confession inadmissible"); *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980) ("statements obtained by foreign officers conducting interrogations in their own nations have been held admissible despite a failure to give *Miranda* warnings to the accused," at least where the conduct does not "shock[] the conscience of the American court," American officials did not "participate[] in the foreign search or interrogation," and the foreign agents were not "acting as agents for their American counterparts"); *United States v. Covington*, 783 F.2d 1052, 1056 (9th Cir. 1985) ("the exclusionary rule is not applicable to interrogations performed by foreign police officers acting in their own country"); *United States v. Khan*, 993 F.2d 1368, 1376 n.7 (9th Cir. 1993) ("Statements given to police officers of a foreign country are not excludable because *Miranda* warnings are not given.") (citation omitted).

[9] *See Neely v. Henkel*, 180 U.S. 109, 122-23 (1901) ("[T]he provisions of the Federal Constitution relating to the writ of habeas corpus, bills of attainder, ex post facto laws, trial by jury for crimes, and generally to the fundamental guaranties of life, liberty, and property embodied in that instrument . . . have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country. . . . When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people.").

[10] Another court of appeals has similarly concluded that, "[w]hen the interrogation is by the authorities of a foreign jurisdiction, the exclusionary rule has little or no effect upon the conduct of foreign police." *Chavarria*, 443 F.2d at 905. Put simply, "applying the *Miranda* rule to foreign police officers will not affect their conduct, and therefore

The Supreme Court's recent declaration that *Miranda* is a "constitutional decision," *Dickerson*, 530 U.S. at 438, does not alter the above analysis. It might be argued that after *Dickerson*, *Miranda* must be understood as a "constitutional rule" establishing a fixed test for determining whether statements are "compelled" for purposes of the Fifth Amendment. *Cf. id.* at 455-56 (Scalia, J., dissenting) (suggesting that this must be the implication of the Court's decision). That gloss on *Dickerson* might be used to cast doubt on the exceptions to *Miranda* noted above based on the theory that the exceptions are rooted in the mistaken idea that *Miranda* sets a prophylactic rule that is not constitutionally required. In *Quarles*, for example, the Court based its analysis in part on the statement that "[t]he prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" 467 U.S. at 654.[11] Now that the Court has made clear that *Miranda* is a constitutional requirement in its own right, the argument would go, practical considerations such as deterrence cannot limit the application of *Miranda*'s rules.

That approach, however, distorts *Dickerson*. In establishing *Miranda* as a constitutional rule, *Dickerson* merely held that the body of law established by *Miranda* and its progeny set constitutional requirements determined by the Court that could not be disturbed by an act of Congress.[12] Nowhere did the *Dickerson* Court suggest that it was radically reforming the rationale behind *Miranda* and later cases to make *Miranda* an inflexible constitutional determination that *all* unwarned custodial statements are necessarily "compelled" testimony under the Fifth Amendment. Instead, the Court treated *Miranda*, as the language from the original decision itself suggests, as "constitutional guidelines for law enforcement agencies" crafted by the Court. 384 U.S. at 442. Because they were defined by the Court as constitutional requirements, Congress could not modify them, but in the Court's view, that did not mean that *courts* could not define limits on *Miranda* based on the same balancing of interests outlined in the cases above (and employed by courts in other constitutional

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we decline to so extend the scope of that decision." *Commonwealth v. Wallace*, 248 N.E.2d 246, 248 (Mass. 1969). *See also United States v. Welch*, 455 F.2d 211, 212 (2d Cir. 1972) ("[S]ince the *Miranda* requirements were primarily designed to prevent United States police officers from relying upon improper interrogation techniques and as the requirements have little, if any, deterrent effect upon foreign police officers, the *Miranda* warnings should not serve as the *sine qua non* of admissibility."); *Yousef*, 925 F. Supp. at 1076 ("[T]he purpose of the rule that any statement taken in violation of *Miranda* is inadmissible is to prevent and deter United States law enforcement personnel from taking involuntary statements that are the result of unduly coercive custodial circumstances.").

[11] Similarly, at least some courts tied the exception for foreign police interrogations to the concept that *Miranda* is a "prophylactic" rule. One court, for example, explained that, because "[w]e have generally held that *prophylactic constitutional rules* designed to deter police misconduct do not apply to foreign police behavior," the "*Miranda* rules [have been held] inapplicable to Mexican police interrogations," just as the "Fourth Amendment exclusionary rule does not apply to illegal searches conducted by Mexican authorities acting without substantial involvement by American officials." *United States v. Wolf*, 813 F.2d 970, 972 n.3 (9th Cir. 1987) (citations omitted, emphasis added).

[12] Two years after *Miranda* was decided, Congress enacted a provision now codified at 18 U.S.C. § 3501 (1994). By purporting to eliminate the warnings requirements of *Miranda* and restore voluntariness as the "touchstone of admissibility," section 3501 was intended to override *Miranda*. *Dickerson*, 530 U.S. at 436. *Dickerson* held that Congress could not override *Miranda*. *See id.* at 432 ("We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress[.]").

contexts). In keeping with that understanding, the Court never cast doubt on the various limitations and exceptions to *Miranda* already embedded in the Court's jurisprudence. To the contrary, *Dickerson* explicitly embraced the Court's existing decisions. Addressing the decisions in *Quarles* and *Harris* specifically, the Court stated that they "illustrate the principle – not that *Miranda* is not a constitutional rule – but that no constitutional rule is immutable." 530 U.S. at 441. The Court concluded that "the sort of modifications represented by these cases are *as much a normal part of constitutional law* as the original decision," *id.* (emphasis added), and held that *Miranda* "*and its progeny in this Court*" continue to "govern the admissibility of statements made during custodial interrogation in both state and federal courts" *id.* at 432 (emphasis added). Thus, as one court of appeals has observed, "the *Dickerson* majority expressly incorporated existing decisions, like *Quarles*, into the 'constitutional' right to a *Miranda* warning it elucidated in *Dickerson*." *United States v. Talley*, 275 F.3d 560, 564-65 (6th Cir. 2001).

There is certainly nothing in *Dickerson* that expands *Miranda* to require warnings in all forms of custodial interrogation. In fact, the *Dickerson* Court repeatedly recognized that the core function of *Miranda* was to address "the advent of modern custodial *police* interrogation," which "brought with it an increased concern about confessions obtained by coercion." 530 U.S. at 434-35 (emphasis added). *See also id.* at 443 ("*Miranda* has become embedded in *routine police practice*") (emphasis added); *id.* (discussing the "impact of the *Miranda* rule on *legitimate law enforcement*") (emphasis added). Nowhere in the opinion did the Court indicate any inclination to depart from past practice and unhinge the scope of *Miranda* from the rationale of regulating U.S. law enforcement officers that has guided the Court in the past.

The same logic that has underpinned the exceptions to *Miranda* outlined above demonstrates that *Miranda* warnings have no application in interrogations conducted by military and intelligence officers for purposes of gathering intelligence and military operations information from a battlefield detainee. Nothing in the Court's explanation of *Miranda* and its progeny applies to, or even addresses, the interrogation of enemy prisoners in a military theater of operations for the purpose of obtaining military and intelligence information. Applying *Miranda's* requirements in this context would do nothing to advance the goal that the Supreme Court has repeatedly treated as a guiding factor in determining the scope of *Miranda* – namely, regulating the conduct of law enforcement officials in criminal investigations. Indeed, where an interrogation is conducted for obtaining military operations and intelligence information, *Miranda*'s concerns for regulating questioning in the law enforcement context are irrelevant. The goal in such a scenario is not to carefully balance the rights of a criminal defendant under our constitutional system against the needs of law enforcement, but rather to ensure that our troops and intelligence officers can extract as much useful information as possible for protecting our troops and securing our military objectives. The Court's stated concerns for providing "constitutional guidelines for law enforcement agencies and courts," in other words, are a mismatch for this context. *Miranda*, 384 U.S. at 442.

The conclusion that the purposes of *Miranda* would not be served by applying the decision to interrogations conducted for military operations and intelligence information is bolstered by the fact that restrictions imposed by the Fourth, Fifth, and Sixth Amendments generally do not apply to

the actions of our armed forces in an armed conflict. This Office recently opined that the Fourth Amendment does not apply to United States military actions, both within the United States and abroad, taken to combat terrorists in the wake of the September 11 attacks. *See* Memorandum for Alberto R. Gonzales, Counsel to the President & William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force To Combat Terrorist Activities Within the United States* at 22-34 (Oct. 23, 2001). As we explained, in reversing a lower court decision to apply the Fourth Amendment extraterritorially to non-U.S. citizens, the Supreme Court pointed out the untenable consequences of applying the Fourth Amendment to United States military operations abroad. *See Verdugo-Urquidez*, 494 U.S. at 273-74. Such a rule would result in applying the Fourth Amendment "also to other foreign policy operations which might result in 'searches or seizures'" – a result that "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *Id.* at 273. The Court explained:

> The United States frequently employs Armed Forces outside this country–over 200 times in our history–for the protection of American citizens or national security. . . . Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest . . . [and] plunge [the political branches] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad.

*Id.* at 273-74 (citations omitted). The Court further noted that in 1798 during the Quasi War with France Congress authorized President Adams to order the seizure of French vessels on the high seas, and "it was never suggested that the Fourth Amendment restrained the authority of Congress or of United States agents to conduct operations such as this." *Id.* at 268. Thus, within the first decade after the Constitution's ratification, the Fourth Amendment was understood not to restrict military operations against the Nation's enemies.

Likewise, the Just Compensation Clause of the Fifth Amendment does not attach to actions taken as a matter of military necessity by United States Armed Forces in the field, even when those actions entail the destruction of property owned by United States citizens (and, indeed, even when the destruction occurs within the territory of the United States). The general rule is that "the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field." *United States v. Pacific R.R.*, 120 U.S. 227, 239 (1887).

We believe that, as in the above cases, "significant and deleterious consequences," *Verdugo-Urquidez*, 494 U.S. at 273, would result from applying *Miranda* to the interrogation of a prisoner who was apparently a member of a transnational terrorist group, who was captured while engaged in military operations against the United States and its allies, and who was being questioned for the purpose of gathering intelligence of military value to the United States in the conflict. Interrogation of enemy prisoners is a practical necessity for waging war effectively. Prisoners are always interrogated for information concerning their unit, enemy troop positions and strength, and

other information that may be relevant to military operations in the area, to force protection, and (particularly in this conflict) to broader national security and intelligence objectives. Such interrogation serves the specifically military and intelligence objectives of the armed forces in the field of combat and the interests of national security. It is not, and is not intended to be, a part of the law enforcement apparatus of the United States. Subjecting the conduct of all such interrogations to the standards outlined in *Miranda* based on the possibility that some statements from an interrogation might later be used in a criminal trial would make no sense.

To be sure, there is a distinction between applying the Fourth Amendment and other constitutional constraints to the conduct of military operations and "applying" *Miranda* to military interrogations. The Fourth Amendment, if applicable, would impose mandatory requirements on the conduct of the armed forces in the field. It would directly regulate the ways in which operations could be conducted and failures to comply would, in themselves, be violations of the Constitution. If *Miranda* applied, however, an unwarned custodial interrogation would not *in itself*, constitute any constitutional violation.[13] Thus, in one sense, "applying" *Miranda* would not *prohibit* the government from conducting interrogations as it chooses; rather, it would simply put the government to the choice of following *Miranda* or forgoing the use of any statements in later criminal trials.

But that distinction does not make a difference for the analysis here. The entire purpose behind *Miranda* as a constitutional rule is to put constraints on conduct. Where the rationale for developing those constraints does not apply, the correct result under *Miranda* and its progeny is that *Miranda* itself does not apply. And for many of the same reasons that it makes no sense to have the Fourth Amendment constrain the conduct of military operations, it also makes no sense to have the constitutionally based rules for interrogations in *Miranda* apply.

**2. Statements obtained during interrogations undertaken to obtain military or intelligence information should be admissible under the public safety exception to *Miranda*.**

Even if the broader rationale for rejecting the application of *Miranda* outlined above were not accepted, we believe that statements obtained in the course of interrogation for purposes of gathering intelligence and military operations information would be admissible at trial in an Article III court under an exception to *Miranda* closely analogous to, and based upon the same rationale as, the "'public safety' exception" announced by the Supreme Court in *New York v. Quarles*, 467 U.S. 649 (1984).

In *Quarles*, the police had chased a rape suspect – who was reportedly armed – into a

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[13] *See, e.g., Calif. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1046-47 (9th Cir. 2000) ("a bare violation of *Miranda* is not enough to sustain a claim under § 1983," although "a failure to comply with *Miranda* can be viewed as an aggravation of other coercive tactics"); *Cooper v. Dupnik*, 963 F.2d 1220, 1243-44 (9th Cir. 1992) ("Our holding . . . does not create a Fifth Amendment cause of action under § 1983 for conduct that merely violates *Miranda* safeguards without also trespassing on the actual Constitutional right against self-incrimination that those safeguards are designed to protect.").

supermarket, where they arrested him, frisked him, and discovered an empty shoulder holster. A police officer asked the suspect, "Where is the gun?" *Id.* at 674. The suspect, gesturing toward a stack of soap cartons, replied, "The gun is over there." *Id.* The Court held that "on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved." *Id.* at 655-56. The Court explained that in such a situation, the "need for answers to questions in a situation posing a threat to the public safety outweighs the need" for the "[p]rocedural safeguards" imposed by *Miranda*. *Id.* at 657. As the Court made clear in *Quarles*, the exception applies to "questions necessary to secure [police officers'] own safety or the safety of the public." *Id.* at 659. *See, e.g., United States v. DeSantis*, 870 F.2d 536, 539 (9th Cir. 1989) ("The 'public safety' exception . . . was intended to protect the police, as well as the public, from danger."); *United States v. Mobley*, 40 F.3d 688, 693 (4th Cir. 1994) (*Quarles* applies to "such circumstances posing an objective danger to the public or police"); *United States v. Khalil*, 214 F.3d 111, 121 (2d Cir. 2000) (*Quarles* applies to statements about construction and stability of bombs seized during raid on defendant's apartment the night before).

We conclude that, where the interrogation of an enemy combatant captured in an area of military operations is at issue, the same reasoning applied in *Quarles* should apply to provide an exception from *Miranda* for questioning directed at eliciting information relevant to military operations and intelligence. If the police are permitted to bypass *Miranda* warnings in order to "secure their own safety or the safety of the public," 467 U.S. at 659, surely the exigencies of combat justify a similar exception for the interrogations contemplated here. As we understand it, interrogation of prisoners seized in battle is undertaken as a matter of course to determine information such as what units of the enemy forces are operating in the area, their position, strength, supply status, etc., as well as information of broader use for intelligence concerning enemy plans and capabilities for launching strikes against U.S. positions. In the context of an armed conflict, it seems readily apparent that *all* such information relates directly to the safety and protection of American troops, who are constantly exposed to the dangers of combat. In addition, in this conflict, given the demonstrated ability of the enemy to attack military and civilian targets around the globe, including within the United States (and given the repeated vows to continue such attacks), interrogations for intelligence and national security purposes may additionally develop information critical for thwarting further imminent loss of American lives far from the immediate scene of battle in Afghanistan. Thus, as in *Quarles*, the lives and safety of both the questioners and others will be directly at stake.

### B. Interrogations for criminal law enforcement purposes.

By contrast, we believe that statements obtained through interrogations conducted abroad for criminal law enforcement purposes – whether by FBI interrogators or military personnel – are

unlikely to be admitted in an Article III criminal trial if *Miranda* requirements are not met.[14]

As outlined above, we believe that the Supreme Court would almost certainly conclude that the Self-Incrimination Clause applies to trials in Article III courts of aliens, even where an alien's only connection to this country is that he has been brought here to be tried. That in itself, however, does not automatically dictate that law enforcement officers interrogating aliens abroad to prepare for such prosecutions must be bound by the *Miranda* regime. There are sound arguments that the *Miranda* system of warnings, while a useful system for controlling the conduct of law enforcement officials operating in the United States, imposes an unwieldy burden in the vastly varying situations law enforcement officers must face while operating abroad. As some courts have noted, for example, when a suspect is in the custody of a foreign police force, some of the *Miranda* rights that are normally described to a suspect may not actually be available because they conflict with the law and procedures of the nation that has custody of the suspect. *See, e.g., Bin Laden*, 132 F. Supp. 2d at 188 ("foreign law may . . . ban all manner of defense counsel from even entering the foreign stationhouse, and such law necessarily trumps American procedure"); *United States v. Dopf*, 434 F.2d 205, 207 (5th Cir. 1970) (*Miranda* satisfied where FBI agent told defendants held by Mexican officials that, because he had no jurisdiction in Mexico, "he could not furnish them with a lawyer in Mexico but [that he could] contact the American Consul on their behalf"). Even where, as here, the suspects are held by the United States government abroad, other factors may make the burdens of *Miranda* outweigh any benefits that *Miranda* may provide in deterring misconduct in run-of-the-mill prosecutions. In particular, it seems likely that when a battlefield detainee is being interrogated for military and intelligence information – a process that may extend over many days or weeks – the provision of *Miranda* warnings by *other* U.S. personnel who may wish to question the same detainee during the same time period for purposes of building a criminal case will make the detainee less likely to provide information vital to the objectives of military and intelligence questioning. In such a scenario, there is a sound argument that the disadvantages that will result from providing *Miranda* warnings (in terms of lost information of military and intelligence value) outweigh any benefits to be gained from applying *Miranda* as a device for regulating police conduct.

It is difficult to predict with any accuracy how the Court would receive such arguments concerning why *Miranda* should not be extended here. Nevertheless, we believe that the weight of authority suggests that courts would require *Miranda* warnings in interrogations conducted by U.S. personnel abroad for law enforcement purposes. Several courts of appeal have already held that when U.S. law enforcement officers interrogate a suspect abroad or direct the questioning carried out by foreign police who are acting essentially as their agents, *Miranda* warnings must be given for any statements to be admissible at trial in the United States. *See Cranford v. Rodriguez*, 512 F.2d 860, 863 (10th Cir. 1975); *United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980). Similarly, earlier this year the Southern District of New York concluded that in prosecutions stemming from

[14] Whether an interrogation is conducted for criminal law enforcement purposes should not be evaluated based on the subjective motivations of the interrogators. Rather, it should be determined objectively based on the nature of the questions. If the questions are directed at eliciting information that is designed to build a case for a criminal prosecution, we believe that most courts would conclude that *Miranda*'s warning requirements apply.

the al Qaeda bombings of U.S. embassies in Africa, "*Miranda* must apply to *any* portion of an overseas interrogation that is, *in fact or form*, conducted by U.S. law enforcement." *Bin Laden*, 132 F. Supp. 2d at 187 (emphasis added). The court justified its holding by relying in large part on cases holding that "the lack of *Miranda* warnings will still lead to suppression if U.S. law enforcement themselves actively participated in the questioning, or if U.S. personnel, despite asking no questions directly, used the foreign officials as their interrogational agents in order to circumvent the requirements of *Miranda*." *Id.* (citations omitted). The same principle could be applied to any interrogation conducted by U.S. personnel for law enforcement purposes – even if conducted by the military. Thus, we believe that there is a substantial risk that an Article III court would regard any attempt by military officers to engage in unwarned interrogation for the sole purpose of either developing criminal charges or facilitating a criminal prosecution as an attempt to "circumvent the requirements of *Miranda*." *Id.*

That said, it may not be necessary under these circumstances to apply the full panoply of warnings and rights that would ordinarily be required under *Miranda*. Under normal conditions, *Miranda* requires that a suspect be warned not only that he has a right to remain silent and that his statements will be used against him, but also that he has a right to have counsel present and to have counsel appointed if necessary. By contrast, courts have found that, at least where an individual is in the custody of officials of another country, whose practices may limit access to counsel, there may be practical limitations on the right to counsel. In other words, the right to counsel as it would be applied in the United States applies only "if the particular overseas context actually presents *no* obvious hurdle to the implementation of an accused's right to the assistance and presence of counsel." *Bin Laden*, 132 F. Supp. 2d at 188. Even then, only "due care" is required to avoid "foreclos[ing] an opportunity" to be represented by counsel "that in fact exists" – that is to say, only the opportunity to obtain counsel subject to the limits of applicable foreign law. *Id.* *See also* *Cranford*, 512 F.2d at 863 (FBI agents satisfied *Miranda* by advising suspect held abroad that he had right to consult U.S. consul in Mexico rather than lawyer); *Dopf*, 434 F.2d at 206-7 (same).[15]

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[15] In *Bin Laden*, which involved suspects in the custody of foreign officials, the court suggested that the following advice of rights could constitutionally be given to aliens interrogated by U.S. law enforcement officials:

> Under U.S. law, you have the right to talk to a lawyer to get advice before we ask you any questions and you can have a lawyer with you during questioning. Were we in the United States, if you could not afford a lawyer, one would be appointed for you, if you wished, before any questioning.
>
> Because you are not in our custody and we are not in the United States, we cannot ensure that you will be permitted access to a lawyer, or have one appointed for you, before or during any questioning.
>
> However, if you want a lawyer, we will ask the foreign authorities to permit access to a lawyer or to appoint one for you. If the foreign authorities agree, then you can talk to that lawyer to get advice before we ask you any questions and you can have that lawyer with you during questioning.
>
> If you want a lawyer, but the foreign authorities do not permit access at this time to a lawyer or will not now appoint one for you, then you still have the right not to speak to us at any time without a lawyer present.

It is not clear whether analogous considerations would apply when the individual is in the custody of U.S. Armed Forces overseas. There may be strong arguments that providing a detainee appointed counsel while he is held by the armed forces is not a practical alternative (perhaps for reasons of security of the detention facility) and would unduly interfere with the military's own ongoing questioning of the subject for military and intelligence information. We could pursue further the extent to which modifications to the traditional *Miranda* warnings might be justified in this context if you so request.

### C. Interrogations by investigative services of one of the U.S. Armed Forces investigating war crimes.

We understand that members of the criminal investigative services of the individual branches of the U.S. Armed Forces may wish to interrogate persons in order to investigate the possible commission of war crimes for subsequent prosecution before military commissions. As noted in Part II of this memorandum, *Miranda* does not bar the admission of evidence in a proceeding before a military commission. We understand, however, that even if the armed forces begin interrogating an individual with a view to a military commission trial, the possibility remains that the individual will later be transferred to civilian custody for purposes of criminal prosecution before an Article III court in the United States. The question will then be whether *Miranda* bars any unwarned statements obtained by the military investigators.

Based on the analysis above, we believe that war crimes investigations by military personnel preparing for a possible trial by military commission are not the kind of law enforcement investigations that *Miranda* was intended to regulate. Although such investigations are, in some sense, "criminal" in nature, their primary purpose is the execution of the President's wartime power as Commander in Chief "to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war," and not his authority as the nation's chief law enforcement officer. *Application of Yamashita*, 327 U.S. 1, 11 (1946).[16] After all, "[t]he trial and punishment of enemy combatants who have committed violations of the law of war is . . . a *part of the conduct of war* operating as a preventive measure against such violations." *Id.* (emphasis added). *Miranda*'s guiding rationale based on regulating the conduct of law enforcement agencies does not properly apply in such a case. Thus, unwarned statements obtained by military investigators in that context should be admissible in a later trial in federal court.

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132 F. Supp. 2d at 188 n.16.

[16] This distinction is not a novel one. We recently opined that the Posse Comitatus Act, 18 U.S.C. § 1385 (1994), which generally prohibits the domestic use of the Armed Forces for law enforcement purposes absent constitutional or statutory authority to do so, does not forbid the use of military force for the military purpose of preventing and deterring terrorism within the United States. *See* Memorandum for Alberto R. Gonzales, Counsel to the President & William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force To Combat Terrorist Activities Within the United States* at 15-20 (Oct. 23, 2001).

Nevertheless, we caution that no courts have addressed this issue, the matter is not at all free from doubt, and there is a very substantial risk that a court would reach the opposite conclusion and decide that *Miranda*'s requirements do properly apply. A court could conclude that, while interrogations of battlefield detainees for intelligence and information related to operations are one matter (and outside the ambit of *Miranda*), a different matter is presented when there is a switch to any form of criminal investigation – even if the only intended objective at the time of the questioning is developing a case for a military commission trial. There is always the possibility that the investigation will lead to trial in an Article III court. Indeed, it might be argued that this possibility is enhanced here because the only person charged so far in relation to the attacks of September 11 has been charged in federal court (even though the attacks appear to involve several violations of the laws of war), and, in any event, some war crimes can also be prosecuted as violations of federal criminal law, *see* 18 U.S.C. § 2441 (Supp. III 1997).

Further support for applying *Miranda* to custodial interrogations by war crimes investigators might be drawn from Supreme Court decisions involving interrogation by government officials other than police officers. In *Mathis v. United States*, 391 U.S. 1 (1968), the Court extended the requirement of *Miranda* warnings to an interview conducted by an IRS agent with a person in custody on the ground that, even though the IRS had not yet begun any criminal investigation, "tax investigations frequently lead to criminal prosecutions," *id.* at 4. *See also id.* ("[A]s the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecution."); *cf. id.* at 7 (White, J., dissenting) (suggesting that the majority's statement may be "a hint that any in-custody questioning by an employee of the Government must be preceded by warnings if it is within the immensely broad area of investigations which 'frequently lead' to criminal inquiries"). Similarly, in *Estelle v. Smith*, 451 U.S. 454 (1981), the Court applied *Miranda* to statements made during a court-ordered psychiatric examination when the prosecution later attempted to use those statements against the defendant during the penalty phase of a criminal trial. The fact that the defendant "was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney" was "immaterial." *Id.* at 467. Once the psychiatrist "went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, *his role changed* and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id.* (emphasis added).[17] Thus, a court might exclude statements made

[17] *See also United States v. D.F.*, 63 F.3d 671, 682-83 (7th Cir. 1995) (Under *Mathis*, "it is not the particular job title that determines whether the government employee's questioning implicates the Fifth Amendment, but whether the prosecution of the defendant being questioned is among the purposes, definite or contingent, for which the information is elicited. . . . [A]lthough a government employee need not be a law enforcement official for his questioning to implicate the strictures of the Fifth Amendment, his questioning must be of a nature that reasonably contemplates the possibility of criminal prosecution.") (footnotes omitted); *Battie v. Estelle*, 655 F.2d 692, 699 (5th Cir. 1981) ("[T]he particular office that the official who performs the custodial interrogation represents is inconsequential because *Miranda* was not concerned with the division of responsibility between the various state investigatory agencies but was concerned with official custodial interrogations of an accused and the use of statements obtained from an accused without an attorney in such circumstances to prove the State's case against the accused.").

during custodial interrogation by war crimes investigators unless the *Miranda* requirements are satisfied, on the grounds that such interrogation bears a similarly close nexus to law enforcement.

While we do not believe that this analysis would be correct, it undeniably presents a substantial risk. Accordingly, if a decision has not yet been made concerning where an individual will be prosecuted and if it is deemed essential to ensure that any statements obtained by military investigators may be used in a subsequent trial in an Article III court, we believe that it would be prudent to provide *Miranda* warnings.

### D. Interrogations with Mixed or Dual Purposes.

In some cases there may be claims that a given interrogation does not fall neatly into only one of the categories outlined above, or claims that the lines between categories have been blurred because there were different motives behind the questioning. It is possible, for example, that military interrogators primarily seeking information relevant to operations and intelligence may have some interest in determining whether a detainee was engaged in conduct chargeable as a crime or a war crime. As explained below, for the most part we believe that the subjective motives of the interrogator should not alter analysis, which should be guided instead by an objective assessment of the nature of the questioning.

First, and most importantly, under the reasoning outlined above, we have concluded that *Miranda* should not apply at all to military and intelligence officers' questioning conducted for obtaining military and intelligence information because officers acting in this capacity are not the intended objects of *Miranda*'s rules of conduct. Their subjective motivations in asking any particular questions should not alter this analysis. Nor should the analysis be affected even if it turns out after the fact that an objective assessment of certain particular questions demonstrates that the information sought was relevant solely to establishing the role of the detainee in a past criminal act. Such factors should not matter as long as overall, the primary objective of the questioning is military operations and intelligence information and the interrogators are in good faith pursuing their role in developing such information. Their particular motivations for asking certain questions or the exact nature of the information sought in particular questions should not serve as a basis for later claiming that *Miranda* warnings should have been supplied in such an interrogation.[18]

Second, we explained above that an extension of the public-safety exception should apply by analogy to interrogations for military and intelligence information, and the Supreme Court has directly addressed the question of dual motives behind questioning in the context of that exception. The Court made clear that the "availability of [the public-safety] exception does not depend upon the motivation of the individual officers involved." 467 U.S. at 656. *See also id.* ("[T]he

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[18] Of course, a different issue would be raised if it appeared that military and intelligence officers had taken it on themselves to develop a criminal investigation in order to exploit the absence of *Miranda* warnings in their interrogations or were merely acting as the proxies for law enforcement by asking questions at the direction of, for example, FBI agents. Determining where the line would be drawn requiring *Miranda* in such cases would likely depend on a highly fact-intensive inquiry into the particular circumstances.

application of the exception which we recognize today should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer."). "Whatever the motivation" of those conducting the questioning, the Court concluded that the exception should apply if there were an objective basis for concluding that the questions were "reasonably prompted by a concern for the public safety." *Id.* In other words, where there is objectively "a situation posing a threat to the public safety," *id.* at 657, questions reasonably aimed at eliminating that threat can be asked without *Miranda* warnings. The Court thus drew a distinction between "questions necessary to secure [police officers'] own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 659.

We conclude that, to the extent the public-safety exception is extended by analogy to military and intelligence questioning, the same analysis of dual motives should apply. Thus, as long as there was an objectively reasonable basis to believe that the information sought by military and intelligence officers would reduce the dangers to the lives and safety of American military personnel, allied forces or others, we believe it would not matter if the questioners were also partially motivated by a law-enforcement concern.[19] Questions in the sort of interrogation we have described above seem reasonably related to the former purpose and are certainly not directed solely at the latter.

Finally, a similar dual motive analysis might be applied to argue that when law enforcement personnel – such as FBI agents – are questioning a detainee, it is only when they ask questions solely for law-enforcement purposes that *Miranda* is required. Where questions objectively can be said to be related to securing public safety, the *Quarles* exception should apply. Stated thus generally, we think this is a correct statement of the law, but we nevertheless caution that it likely does not provide a very useful guide for conduct. As we understand the factual situation, detainees will likely be seized by the military and initially interrogated for operational and intelligence information. Much of this information will be most critical for securing safety within the theater and addressing military threats. The detainee may later be questioned by law enforcement personnel (and others acting at the direction of law enforcement). We think there is a substantial risk in this context that courts will view the change in personnel conducting the interrogations as a proxy for a change in the focus of the questioning and conclude that all such interrogations are for law enforcement purposes. Thus, even if some questions are reasonably related to "public safety" (as broadly conceived in this context), it may be more difficult to establish that the public-safety exception applies. In addition, to receive the benefit of the public-safety exception, it seems likely that law enforcement interrogators would have to ask questions related to public safety first before *Mirandizing* the detainee and proceeding with further questioning. We think it unlikely that a court would take the

[19] The Court's holdings in "dual motive" cases under the Fourth Amendment also tend to support our conclusion in this context. As a general matter, the Fourth Amendment case law does not require that a search or seizure have only a single purpose so long as it is otherwise legitimate. Thus, the police may engage in (objectively justified) traffic stops even if their underlying motive may be to investigate other violations as to which no probable cause or even articulable suspicion exists. *See Whren v. United States*, 517 U.S. 806 (1996); *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (otherwise valid warrantless boarding of vessel by customs officials not invalidated by facts that state police officer accompanied customs officials and officers were following tip that vessel might be carrying marijuana).

record of a broad-ranging interview, much of which was conducted plainly for the purpose of eliciting incriminating evidence, and parse out those questions and answers that are related to public safety to admit them into evidence. The Supreme Court's analysis in *Quarles* suggested that the exception was designed to permit officers to ask questions immediately as reasonably needed to address safety matters and then to *Mirandize* a suspect before further questioning. It seems likely that courts will attempt to adhere to that pattern. Because of these concerns, we think the most prudent approach would be to provide *Miranda* warnings at the outset when the interrogation is being conducted by law enforcement officers building a criminal case.[20]

## IV. Subsequent *Mirandizing* after failure to warn.

For purposes of determining whether *Miranda* warnings should be applied in the more doubtful scenarios considered above, it may be important to understand that if *Miranda* warnings are not given in an interview where it is later determined they were required, the result will *not* be that all statements subsequently made by the individual in later interviews will be inadmissible as "fruit of the poisonous tree." To the contrary, as a general matter, a subsequent, properly *Mirandized* statement may be used against an individual even if that individual has previously given an unwarned statement during questioning when *Miranda* warnings should have been provided.

The Supreme Court has held that a second, *Mirandized* statement is admissible so long as the earlier statement, although inadmissible itself under *Miranda*, was nevertheless voluntarily made. Where the first statement was involuntarily made, the second, *Mirandized* statement can still be admitted, but only where there has been an adequate break in events between the two statements to ensure that the later one is voluntary. In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court explained:

> [T]here is no warrant for presuming coercive effect [in a second, *Mirandized* confession] where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. . . . [A] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.

*Id.* at 318. Thus, where the first statement was voluntary (even if unwarned), the Court refused to require the "break in the stream of events" that would have been required had the first statement been coerced. *Id.* at 310; *see also id.* at 318 (declining to require "a passage of time or break in events before a second, fully warned statement can be deemed voluntary"); *cf. Miranda*, 384 U.S. at 496

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[20] Of course, there may be some specialized branches of law enforcement agencies (such as a counter-terrorism unit in the FBI) whose mission is instead to expose and thwart pending terrorist attacks. Their questioning, therefore, may be much more similar to questioning conducted for intelligence and national security objectives, and should be treated the same. Thus, an objective assessment of the type of information being sought in the questioning remains the critical touchstone for assessing the application of *Miranda*. We note simply that questioning by personnel traditionally associated with law enforcement will likely serve as a rough proxy for most courts in concluding that the questioning was for law-enforcement purposes.

("A different case would be presented if an accused [who had previously given an involuntary confession] were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them.").

*Elstad*, moreover, has not been undermined by *Dickerson* and the determination that *Miranda* is a constitutional rule. Although the *Elstad* opinion relied in part on the view that *Miranda* was not a constitutional ruling, *see, e.g.*, 470 U.S. at 308, that rationale was not essential to its holding. As the Court noted, "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion." *Elstad*, 470 U.S. at 307. Whether the presumption arises out of the Constitution or by judicial creation, it is that compulsion that triggers the Self-Incrimination Clause in the first place. Once warnings are given, however, the presumption of coercion evaporates. In the Court's words,

> a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'

*Id.* at 310-11 (citation omitted). Indeed, to rule otherwise would

> effectively immunize[] a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent. This immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself. When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.

*Id.* at 312 (citations omitted).

Nothing in this logic depends upon whether the presumption arose out of the Fifth Amendment itself or by judicial creation.[21] The touchstone of both the Self-Incrimination Clause and *Miranda* is compulsion, and as *Elstad* makes clear, there is no basis for presuming compulsion once an individual has been given *Miranda* warnings. Nothing in *Dickerson* alters that result. Rather, the *Dickerson* Court expressly noted that *Elstad* was consistent with its approach to treating

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[21] *See also id.* at 308 ("[T]he absence of any coercion or improper tactics undercuts the twin rationales--trustworthiness and deterrence [of constitutional violations]--for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities."); *id.* at 308-9 ("A living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. . . . The living witness is an individual human personality whose attributes of will, perception, memory and *volition* interact to determine what testimony he will give.") (quotations omitted); *id.* at 314 ("A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.").

*Miranda* as a constitutional decision and explained that *Elstad* "simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." 530 U.S. at 441. The Court thus made plain that the result in *Elstad* did not depend on the theory that *Miranda* was a "nonconstitutional decision." *Id.* Instead, it rested on other differences between an unlawful search and unwarned interrogations, foremost among them being the fact (emphasized in *Elstad*) that, while an unlawful search may lead inexorably to the discovery of pieces of evidence such that they are the products of the unlawful act, in the context of interviews with a suspect who has "attributes of will, perception, memory and *volition*," *Elstad*, 470 U.S. at 309, there can be an intervening act of will when the suspect has been warned of his rights and yet consents to continue making statements to his interrogators.

The courts of appeals that have addressed the issue have agreed that the result in *Elstad* survives the decision in *Dickerson*. *See United States v. DeSumma*, 272 F.3d 176, 180 (3d Cir. 2001) ("We cannot agree with the defendant's reading of *Dickerson* because the Supreme Court appeared to anticipate and reject it. . . . We hold that the fruit of the poisonous tree doctrine does not apply to derivative evidence secured as a result of a voluntary statement obtained before *Miranda* warnings are issued."); *United States v. Orso*, 266 F.3d 1030, 1034 n.3 (9th Cir. 2001) ("The distinction was originally premised on the fact that a *Miranda* violation was not a violation of the Constitution, whereas a Fourth Amendment violation was. . . . Nonetheless, *Dickerson* seems to signal that the distinction set forth in *Elstad* continues unabated.").

## VI. The Sixth Amendment Right to Counsel Does Not Apply Prior to the Initiation of Adversary Judicial Criminal Proceedings.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Unless access to counsel must be provided in order to safeguard an independent constitutional right (such as the Fifth Amendment's protection against coerced confession), it is generally necessary that adversary proceedings be formally initiated before a particular phase of a prosecution can be said to "involve[] critical confrontations of the accused by the prosecution" such as to trigger application of the Sixth Amendment. *United States v. Wade*, 388 U.S. 218, 224 (1967). "'The Sixth Amendment right [to counsel] . . . does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Texas v. Cobb*, 532 U.S. 162, 167-68 (2001) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)).

## VII. The McDade Act Does Not Apply to Defense Department Interrogators.

The McDade Act, 28 U.S.C. § 530B (Supp. IV 1998), reads as follows:

§ 530B. *Ethical standards for attorneys for the Government*

(a) An attorney for the Government shall be subject to State laws and rules, and

local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

Among the "State laws and rules" incorporated by this provision are likely to be state analogues to the American Bar Association's ("ABA") Model Rule of Professional Conduct 4.2 (2001). Rule 4.2 reads as follows:

Rule 4.2 "Communication with Person Represented by Counsel"

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Assuming that a state bar rule similar to Rule 4.2 is among the "State laws and rules" incorporated by section 530B, you have asked specifically whether lawyers on the Judge Advocate Generals' staffs in the Department of Defense are barred from questioning persons detained in Afghanistan or transferred to the custody of the Department of Defense who are represented by counsel. In particular, you have asked whether Defense Department lawyers could question John Walker (Lindh) without the consent of an attorney, Mr. James Brosnahan, claiming to represent him.[22]

Even assuming that a rule similar in substance to Rule 4.2 is incorporated by section 530B, it would not preclude questioning of Mr. Walker by military lawyers even without Mr. Brosnahan's

[22] On December 4, 2001, Mr. James J. Brosnahan wrote to you, stating "I have been retained by the parents of John Walker Lindh to represent him in any matters that might arise." Letter for William J. Haynes, II, General Counsel, Department of Defense, from James J. Brosnahan, Morrison & Forester, LLP at 1 (Dec. 4, 2001). In that letter, Mr. Brosnahan also stated, "I would ask that no further interrogation of my client occur until I have the opportunity to speak with him. As an American citizen, he has the right to counsel and, under all applicable legal authorities, I ask for the right to speak with my client as soon as possible." *Id.*

consent for at least two reasons.[23]

*First*, section 530B does not apply to Department of Defense lawyers. Section 530B by its terms applies only to the conduct of an "attorney for the Government." And subsection 530B(c) expressly defines the term "attorney for the Government" to mean (in addition to an independent counsel and his employees under chapter 40) "any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations." That regulation provides a definition of "government attorney" that largely limits the term to Department of Justice lawyers and does not include lawyers of the Department of Defense.[24] In addition, subsection 530B(b) directs the Attorney General to "make and amend rules of the Department of Justice to assure compliance with this section." That implementing mechanism – relying on rules for the Department of Justice – reinforces the conclusion that the provision applies solely to lawyers in that Department.

Second, Rule 4.2 would permit a covered Government attorney to communicate with a represented party even absent the party's counsel's consent if the Government attorney is "authorized

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[23] We note that Rule 4.2 applies only if Mr. Walker is in fact "represented by another lawyer in the matter." In his letter, Mr. Brosnahan stated that he was retained by Mr. Walker's parents to represent their son. We understand, however, that at the time the letter was written Mr. Brosnahan had never spoken with Mr. Walker. This case thus bears a striking resemblance to *Moran v. Burbine*, 475 U.S. 412 (1986). There, the suspect's sister had attempted to retain a lawyer to represent him, but the suspect waived his *Miranda* rights and confessed before learning of his sister's efforts. The Court found no violation of either *Miranda* or the Sixth Amendment. *See id.* at 425 ("Nor are we prepared to adopt a rule requiring that the police inform a suspect of an attorney's efforts to reach him."). The Court additionally noted "the Rhode Island Supreme Court's finding that, as a matter of state law, no attorney-client relationship existed between respondent and [the counsel obtained by his sister]." *Id.* at 429 n.3 (citing *State v. Burbine*, 451 A.2d 22, 29 (R.I. 1982)). *See also State v. Cline*, 405 A.2d 1192, 1199 (R.I. 1979) ("Generally, the relationship of attorney and client arises by reason of agreement between the parties. . . . Obviously, such a relationship could not exist between persons who had never met and who in all probability were unaware of each other's existence prior to the meeting in the Providence police station."); *cf. United States v. Weinstein*, 511 F.2d 622, 628 (2d Cir. 1975) ("[I]n a criminal proceeding any action taken by the court at the behest of a representative appointed without the defendant's knowledge or consent could not bind the fugitive defendant. . . . [T]he attorney moving on his behalf must at least have been authorized by the defendant to act as his counsel in the case.").

[24] *See* 28 C.F.R. § 77.2(a) (2001) ("The phrase *attorney for the government* means the Attorney General; the Deputy Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, and Tax Division; the Chief Counsel for the DEA and any attorney employed in that office; the General Counsel of the FBI and any attorney employed in that office or in the (Office of General Counsel) of the FBI; any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515; any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; and any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States. The phrase *attorney for the government* also includes any independent counsel, or employee of such counsel, appointed under chapter 40 of title 28, United States Code. The phrase *attorney for the government* does not include attorneys employed as investigators or other law enforcement agents by the Department of Justice who are not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.").

by law to do so." We believe that an Executive Order by the President permitting Government attorneys to communicate with persons held by the armed forces in the current conflict – even if those persons are represented by counsel – would constitute, in the circumstances of this case, legal authorization within the meaning of such a rule. To assume otherwise would be to read a State ethics rule in a manner that significantly trammeled the President's authority as Commander in Chief to take necessary and appropriate measures to acquire information about enemy forces. Such a construction of state law should be avoided since state law cannot stand as an impermissible burden on the exercise of the President's constitutional authority with respect to military and foreign affairs. *See United States v. Pink*, 315 U.S. 203 (1942).

Finally, we note that even if the Government did in fact violate Rule 4.2 by having military lawyers interrogate represented persons (including Mr. Walker) without consent of counsel, it would not follow that the evidence obtained in that questioning would be inadmissible at trial. The Eleventh Circuit has held that neither section 530B nor the State ethics rules it incorporates requires the suppression in a federal proceeding of evidence obtained through a violation of such rules. "[A] state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible. Federal law, not state law, determines the admissibility of evidence in federal court." *United States v. Lowery*, 166 F.3d 1119, 1124 (11th Cir.), *cert. denied*, 528 U.S. 889 (1999). Moreover, the court held, section 530B did not require suppression of evidence obtained in violation of such State laws and rules: Congress did not "intend by that enactment to turn over to state supreme courts in every state – and state legislatures, too, assuming they can also enact codes of professional conduct for attorneys – the authority to decide that otherwise admissible evidence cannot be used in federal court." *Id.* at 1125; *accord Stern v. United States District Court for the District of Mass.*, 214 F.3d 4, 20 (1st Cir. 2000).

Please let us know if we can be of further assistance.

Jay S. Bybee
Assistant Attorney General

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**February 26, 2002**

**Memorandum From: Secretary of the Treasury, Paul O'Neill**
**To: President George W. Bush**

**RE: Corporate Governance**

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

February 26, 2002

**MEMORANDUM FOR THE PRESIDENT**

P. H O'N

**FROM:** **Secretary Paul H. O'Neill**

**SUBJECT:** **Corporate Financial Disclosure**

This memorandum examines issues and options regarding the adequacy of corporate financial disclosure. It reflects on-going discussions of your Working Group on Financial Markets.[1]

## Issue

An ethic in some of professional and corporate America equates GAAP compliance with adequate disclosure. This ethic sets the bar too low. It mistakenly substitutes "color-between-the lines" accounting for good judgement – the kind of judgement that we should require of corporate fiduciaries to inform investors about the financial status and promise of a public company.

The challenge is to restore a value system of responsibility and accountability oriented toward sustained, long-term growth, not short-term market gain. Doing so will require four reforms: (A) re-aligning corporate disclosure practices with the long-term needs of investors; (B) enforcing and expanding the duties of corporate leaders and auditors without inviting frivolous litigation; (C) ensuring auditor independence from management without the inefficiency of bright-line restrictions on auditor relationships with clients; and (D) ensuring sensible accounting rules without the government's making the rules.

## Discussion

**A. General Consensus – Standards of Disclosure.** Fair and efficient capital markets require the disclosure of accurate and meaningful information about the *financial performance, condition and prospects* of a public company. Companies must enable their investors to view the same picture that management sees.

Today, disclosure practices have fallen behind corporate finance, leading to investor ignorance about key risks to companies (e.g., off-balance sheet items and liquidity risks).

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[1] The Working Group includes me as chairman, Chairman Greenspan, Chairman Newsome (CFTC), and Chairman Pitt (SEC). We are joined by Glenn Hubbard and Larry Lindsey.

Today, disclosure practices have fallen behind corporate finance, leading to investor ignorance about key risks to companies (e.g., off-balance sheet items and liquidity risks). Compliance with generally accepting accounting principles is necessary, but not sufficient. Corporate leaders should disclose the kind of information that occupies their days, and that keeps them up at night. Examples include: (i) MIS financial information relied upon to make business decisions (e.g., risk management); (ii) the impact and sensitivity of significant accounting judgements; and (iii) related party transactions. There must be a proactive obligation to disclose information sufficient to enable investors to make informed investment decisions. The incentives of corporate leaders and their outside auditors should accordingly be focused to make disclosure a paramount interest.

**B. Still Open Issue: Standards of Care for Corporate Fiduciaries.** The burden now falls on regulators to out-think CEOs by drafting encyclopedic disclosure rules that CEOs cannot avoid. The Working Group agrees that CEOs instead must bear a proactive duty to disclose but are still not in agreement on the best means of doing so. This could be accomplished by enforcing existing law with fresh rigor, or by adopting a more exacting standard of care for CEOs, or both.

1. Enforce Current Law with Fresh Rigor. More law may not be required, just more enforcement. The SEC can accomplish much through rule changes and tougher enforcement of current law. Companies are already required to disclose all material information and to present fairly their financial condition in regular filings with the SEC. The SEC has already stated that GAAP compliance is not a safe harbor and has begun to use its existing powers to preclude individuals culpable for deficient disclosure from serving as officers or directors. The Commission similarly has announced that it intends to use existing authority to require exacting disclosures of corporate accounting policies that significantly affect financial results.

2. Increase the Standard of Care. Now may be a once-in-a-generation opportunity to lock-in higher standards for corporate disclosure. The current legal standard for personal responsibility of a corporate leader is *recklessness* or *gross* negligence. Mere negligence for inadequate disclosure – failing to exercise the care that we would expect of each of us in the management of our own financial affairs – is excused under current law.

That can be changed. The CEO is in the single best position to judge the sufficiency of disclosure. It is not asking too much that he exercise due diligence in fulfilling either a duty to disclose or, at a minimum, a duty to establish reasonable procedures that affect disclosures. His ownership of the issue could be evidenced by a certification attesting to the completeness, accuracy and fairness of disclosure, and assurance that investors are receiving substantially the same picture of the company as viewed by management, or by an attestation that he has set up procedures that are reasonably structured to produce appropriate disclosures.

Such measures, however, could invite frivolous litigation. The concern could be addressed by limiting the power to enforce compliance to the Commission – i.e., no new private causes of action arise out of the new duty. The SEC's sanctions could include (i) a ban on future service as director or officer of a public company and (ii) disgorgement of compensation for the period of breach.

**C. Auditor Independence and Oversight**

1. Auditor Independence from Management. Most Working Group members oppose outright bans on non-audit consulting work by audit firms or absolute term limits for audit engagements. These bans would forfeit the intellectual capital that a client builds with an outside auditor – an intimate knowledge of how that client does business.

The Working Group is considering less costly alternatives: (i) unanimous approval by the audit committee for the term of audit engagements and simultaneous provision of non-audit services; (ii) full disclosure of all audit and consulting engagements (with fees by line of service) in the audit opinion; (iii) limitations on "revolving door" relations between audit firm employees and audited management; and (iv) prohibitions against simultaneously providing both "outsourced" internal audit work and external audit by a single firm.

2. Regulation and oversight of audit firm performance. The Working Group is likely to concur generally with the SEC's proposal to create a new private-sector regulatory body. This body would set and enforce audit standards and professional conduct. It would review accounting firms' and individual audit partners' practices directly and have the power to review specific audits. It should also be able to punish firms and audit partners with disbarment, disgorgement, and fines. The body's funding should be independent of accounting firms and the Federal budget; its leaders should likewise be free of such ties. It would be subject to SEC oversight. The SEC can create a body like this under existing legislation.

**D. Accounting standard-setting.** Standard-setting by the Financial Accounting Standards Board (FASB) and associated bodies must be more responsive to the needs of investors and more independent of the accounting industry (e.g., investors should have the loudest voice in selecting board members). FASB should make decisions by simple majority (4-3), not super-majorities (5-2). The SEC should take more direct responsibility for setting the rule-making agenda and forcing prompt action. Funding should be completely independent of the accounting industry and from the Federal budget. Again, the SEC can institute these measures under current law.

**MEMORANDUM TO:** **THE PRESIDENT**

**FROM:** **Paul H. O'Neill**
**Secretary of Treasury**

**SUBJECT:** **Corporate Financial Disclosure**

This memorandum examines issues and options regarding the adequacy of corporate financial disclosure. It reflects on-going discussions of your Working Group on Financial Markets.[1]

## Issue

An ethic in some of professional and corporate America equates GAAP compliance with adequate disclosure. This ethic sets the bar too low. It mistakenly substitutes "color-between-the lines" accounting for good judgement – the kind of judgement that we should require of corporate fiduciaries to inform investors about the financial status and promise of a public company.

The challenge is to restore a value system of responsibility and accountability oriented toward sustained, long-term growth, not short-term market gain. Doing so will require four reforms: (A) re-aligning corporate disclosure practices with the long-term needs of investors; (B) enforcing and expanding the duties of corporate leaders and auditors without inviting frivolous litigation; (C) ensuring auditor independence from management without the inefficiency of bright-line restrictions on auditor relationships with clients; and (D) ensuring sensible accounting rules without the government's making the rules.

## Discussion

**A. General Consensus – Standards of Disclosure.** Fair and efficient capital markets require the disclosure of accurate and meaningful information about the *financial performance, condition and prospects* of a public company. Companies must enable their investors to view the same picture that management sees.

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[1] The Working Group includes me as chairman, Chairman Greenspan, Chairman Newsome (CFTC), and Chairman Pitt (SEC). We are joined by Glenn Hubbard and Larry Lindsey.

Today, disclosure practices have fallen behind corporate finance, leading to investor ignorance about key risks to companies (e.g., off-balance sheet items and liquidity risks). Compliance with generally accepting accounting principles is necessary, but not sufficient. Corporate leaders should disclose the kind of information that occupies their days, and that keeps them up at night. Examples include: (i) MIS financial information relied upon to make business decisions (e.g., risk management); (ii) the impact and sensitivity of significant accounting judgements; and (iii) related party transactions. There must be a proactive obligation to disclose information sufficient to enable investors to make informed investment decisions. The incentives of corporate leaders and their outside auditors should accordingly be focused to make disclosure a paramount interest.

**B. Still Open Issue: Standards of Care for Corporate Fiduciaries.** The burden now falls on regulators to out-think CEOs by drafting encyclopedic disclosure rules that CEOs cannot avoid. The Working Group agrees that CEOs instead must bear a proactive duty to disclose but are still not in agreement on the best means of doing so. This could be accomplished by enforcing existing law with fresh rigor, or by adopting a more exacting standard of care for CEOs, or both.

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1. Enforce Current Law with Fresh Rigor. More law may not be required, just more enforcement. The SEC can accomplish much through rule changes and tougher enforcement of current law. Companies are already required to disclose all material information and to present fairly their financial condition in regular filings with the SEC. The SEC has already stated that GAAP compliance is not a safe harbor and has begun to use its existing powers to preclude individuals culpable for deficient disclosure from serving as officers or directors. The Commission similarly has announced that it intends to use existing authority to require exacting disclosures of corporate accounting policies that significantly affect financial results.

2. Increase the Standard of Care. Now may be a once-in-a-generation opportunity to lock-in higher standards for corporate disclosure. The current legal standard for personal responsibility of a corporate leader is *recklessness* or *gross* negligence. Mere negligence for inadequate disclosure – failing to exercise the care that we would expect of each of us in the management of our own financial affairs -- is excused under current law.

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That can be changed. The CEO is in the single best position to judge the sufficiency of disclosure. It is not asking too much that he exercise due diligence in fulfilling either a duty to disclose or, at a minimum, a duty to establish reasonable procedures that affect disclosures. His ownership of the issue could be evidenced by a certification attesting to the completeness, accuracy and fairness of disclosure, and assurance that investors are receiving substantially the same picture of the company as viewed by management, or by an attestation that he has set up procedures that are reasonably structured to produce appropriate disclosures.

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Such measures, however, could invite frivolous litigation. The concern could be addressed by limiting the power to enforce compliance to the Commission – i.e., no new private causes of action arise out of the new duty. The SEC's sanctions could include (i) a ban on future service as director or officer of a public company and (ii) disgorgement of compensation for the period of breach.

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**C. Auditor Independence and Oversight**

1. Auditor Independence from Management. Most Working Group members oppose outright bans on non-audit consulting work by audit firms or absolute term limits for audit engagements. These bans would forfeit the intellectual capital that a client builds with an outside auditor – an intimate knowledge of how that client does business.

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**March 4, 2002**

**Memorandum From Chairman of the Board of Governors, of the Federal Reserve system, Alan Greenspan**
**To: Department of the Treasury**

**RE: Corporate Governance**

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

ALAN GREENSPAN
CHAIRMAN

FACSIMILE TRANSMISSION COVER SHEET

DATE: 3/4/02

TO: The Honorable Peter Fisher
Department of the Treasury

FAX NO: 202/622-0265

FROM: Stephanie Gamble

FAX NO: 202/452-6499

Number of pages including this cover sheet: 11

COMMENTS: See attached Chairman Greenspan's "Dragonis Remind"

If this message is incomplete or you need retransmission, please call: 202/452-3201

Alan Greenspan
March 4, 2002

**Corporate Accounting and Disclosure:**

**A Diagnosis of the Problem**

Corporate governance has evolved over the past century to more effectively promote the allocation of the nation's savings to its most productive uses. And, generally speaking, it has served us well. We could not have achieved our current level of national productivity if corporate governance was deeply flawed.

And yet, our most recent experiences with the bankruptcy of Enron and, preceding that, a number of lesser such incidents, suggest that the practice of corporate governance has strayed from our perceptions of how it is supposed to work. By law, shareholders own our corporations and direct the allocation of corporate resources in an endeavor to maximize the value of the firm. To the extent they succeed, they foster the optimum allocation of capital in our economy.

But as our economy has grown, and our corporations have become ever larger, de facto shareholder control has diminished: ownership has dispersed, and few shareholders have sufficient stakes to individually influence the choice of boards of directors or the chief executive officer. The vast majority of corporate share ownership is for investment, not to achieve

operating control of a company, notwithstanding relatively infrequent instances of "hostile" takeover attempts.

Thus, it has increasingly fallen to the CEO to guide the corporation, hopefully in what he or she perceives to be in the best interests of shareholders. The boards of directors appointed by shareholders are in the overwhelming majority of cases chosen from the slate proposed by the CEO. But for the most part, despite providing limited incentives for board members to safeguard shareholder interests, this paradigm has worked, and still works, well.

The CEO sets the business strategy of the organization and strongly influences the choice of the accounting practices that measure the ongoing degree of success or failure of that strategy. Outside auditors are generally chosen by the CEO or by an audit committee of CEO-chosen directors. Shareholders usually perfunctorily affirm such choices.

To be sure, a CEO can maintain control over corporate governance only so long as companies are not demonstrably in difficulty. When companies run into trouble, the carte blanche granted CEOs by shareholders is withdrawn. Existing shareholders or successful "hostile" bidders for the corporation will then displace boards of directors and CEOs. Such changes in corporate

control have been relatively rare, but more often than not have contributed to a more effective allocation of corporate capital.

Realistically, markets have no alternative but to depend on the CEO to ensure an objective evaluation of the prospects of the corporation. Outside of those relatively few large pension funds and other institutional investors, few existing or potential shareholders have the research capability to analyze corporate reports and thereby judge the investment value of a corporation. This service has become dominated by institutions in the business of underwriting and/or selling securities. And, unfortunately, history indicates that long-term earnings forecasts of brokerage-based security analysts, on average, have been persistently overly optimistic. Presumably this is because firms that sell securities are disinclined to hire analysts with a bearish inclination.[1]

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[1] The performance of analysts may be improved as a result of the recent initiative by the NASD and NYSE to require research reports to include the distribution of an analyst's ratings and historical stock price graphs that plot when analysts issued recommendations. But it could be further improved if the NASD and NYSE systematically tracked the ex-post performance of analysts' recommendations by brokerage firm and compiled and published comparisons of performance. The market could then assess the credibility of the firms, which, in turn, would reward or punish the performance of individual analysts. The market value of security analysts rests on their credibility.

Prior to the last few decades, earnings estimates were not nearly so important an element in assessing the value of corporations. Instead investors could rely on dividends, which more closely tracked earnings and were interpreted as a reliable indicator of long-term earnings prospects.[2] But since the early 1980s corporations increasingly have been paying out cash to shareholders in the form of share repurchases rather than dividends. The substitution of share repurchases for dividends seems to have been driven by diminished concerns that repurchases could be considered market manipulation and by a desire to manage shareholder dilution from employee stock options. Investors appear to have accepted dividend pay-out ratios at a fraction of their earlier levels, and now seem of necessity to pay augmented attention to earnings.

Unlike cash dividends there is no unambiguously "correct" statement of earnings. Most assets are valuable because they can produce future income. But an appropriate judgment of that asset value depends critically on a forecast of forthcoming events that by their nature are uncertain. How one chooses to evaluate the future income potential of the balance sheet has

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[2] A half century ago, dividend yields on stocks typically averaged 6% when AAA corporates were yielding 3%. Today, dividend yields are barely above 1% while AAA corporates yield about 7%.

significant impact on reported earnings. Even decidedly off-balance sheet entries, such as defined benefit pension plans, require assumptions of future returns that markedly impact corporate pension contributions, and hence, earnings.

Attention to earnings was galvanized by the emergence of an elevated upward ratcheting of productivity growth that propelled long term earning growth potentials higher, and in tandem raised price-earnings ratios. Owing to the broad flexibility of allowable assumptions under GAAP, uncertainty about the rate of productivity growth enhanced uncertainty about long term earnings projections. Quarterly earnings results have become increasingly subject to anticipation, spin, and rumor. CEOs, under increasing pressure from the investment community to meet elevated expectations, in too many instances have been drawn to accounting devices whose sole purpose is arguably to obscure potential adverse results. Outside auditors, on several well publicized occasions, have sanctioned such devices allegedly for fear of losing valued corporate clients. It is not surprising that since 1998 earnings restatements have proliferated.

In this environment, a disturbing amount of corporate accounting has come to rest on little more than conforming to the principles of GAAP, without endeavoring to judge whether the companies' accounts in total do, in fact, represent a full and

accurate portrayal of the current financial state of the corporation.

So long as the corporate duty to disclose is viewed as limited to conforming to GAAP, disclosures will remain inadequate. Both the standards and the standard-setting process undoubtedly can and should be improved. But absent a fundamental change in the perception of the duty to disclose, firms will have incentives to continue to game the accounting system.

Such a change in perception may already be occurring. The sharp decline in stock and bond prices following Enron's collapse has chastened many of the uncritical practitioners of such gaming the accounting system. Out of the ashes of the Enron debacle corporate reputation is fortunately reemerging as a significant economic value. Markets are evidently beginning to put a price/earnings premium on reported earnings that appear free of "spin." Likewise, perceptions of the reliability of firms' financial statements are increasingly reflected in yield spreads on corporate bonds. Corporate governance is, doubtless, measurably improving as a result of this greater market discipline in the wake of the Enron debacle.

But much more needs to be done. It is important for current corporate governance practice to further realign itself with the de jure model that served us so well in the past. The

convergence must come primarily from changes in incentives for corporate officers.

Stock options are a highly desirable means of compensation to align corporate officer incentives with those of shareholders. Nonetheless, we believe that the accounting for options has created some perverse effects on the quality of corporate disclosures. The failure to include, as permitted, but not required, by FASB in 1995, the value of most stock option grants as employee compensation and, hence, to subtract them from pretax profits, has artificially increased reported earnings and presumably stock values. The Federal Reserve staff estimates that the substitution of option grants for cash compensation added about 2-1/2 percentage points to reported annual growth in earnings of our larger corporations between 1995 and 2000. One must assume that this led to some misallocation of the nation's capital assets, especially in the high-tech sector.[3]

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[3] Federal Reserve analysis indicates a significantly higher degree of stock price volatility of those corporations that were relatively aggressive in their use of stock option grants. The stock prices of such firms also appeared to have risen more sharply in 1999 and early 2000 compared with stocks of firms with relatively less than expected option grants. Doubtless higher reported earnings drew increased capital investment in high tech firms, but arguably, in retrospect, much was misused. It is conceivable, of course, that the undoubted gains in national productivity may have been facilitated by an "excess" of investment in high tech industries. This presumably will become clear only in retrospect.

While many of the desired adjustments in corporate governance are doubtless already in train, public policy will need to encourage and sustain those initiatives. In particular, it may be appropriate to define more clearly the duties of CEOs with respect to accounting and disclosure and to introduce regulatory mechanisms and penalties that will supplement and reinforce the market incentives for disclosures that establish trust and goodwill with investors.

But we need to emphasize that official oversight and enforcement has, over the years, proven only partially successful in dissuading individuals from gaming the rules of corporate governance and accounting to serve their own narrow interests. It has proven quite difficult to engage on an ongoing basis a group of directors who see their interests as separate from those of the CEO, who effectively appointed them and, presumably, could remove them from future slates of directors submitted to shareholders. There are, without question, a significant number of directors who are fully independent of the CEO, but it is doubtful that many corporate boards are dominated by them.

More generally, laws could be passed to force selection of slates of directors who are patently independent of CEO influence, and thereby significantly diminish the role of the CEO. We suspect, however, that such an initiative, while

ensuring independent directors, would create competing power centers within the corporation, thereby diluting coherent control and impairing effective governance.[4]

Likewise, efforts to make auditors independent of the CEO would not be without cost. Some proposals, such as prohibiting auditors from providing consulting services in such areas as tax preparation and audit-related data processing are likely, in fact, to do harm and very little good. Nonetheless, as in the case of CEOs, it may be useful to clarify for auditors that their duties are not limited to ensuring that a firm's financial statement conforms to GAAP. Instead, part of an auditor's duty to the CEO is to help the CEO meet his or her disclosure obligation. Here too, it may be possible to introduce regulatory mechanisms to create supplementary financial and legal incentives for auditors to fulfill their duties.

After evaluating alternate forms of corporate governance, we conclude that the current CEO-dominant paradigm, with all its faults, still appears to be the most viable alternative. All of our experience confirms that if the CEO

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[4]Merely appointing directors without financial ties to the corporation will not create an "independent" director unless directors' fees are measurably lowered, which in turn, might deter effective candidates for a board. That would doubtless prove counterproductive to good governance.

chooses to govern in the interests of shareholders, he or she can, by example and through oversight, induce corporate colleagues and outside auditors to behave in ways that produce de facto governance that matches the de jure shareholder-led model that appears so effective in achieving the optimum allocation of the nation's corporate capital.

As already discussed, however, changes in critical areas of governance to align CEO interests more closely with those of shareholders in our judgment are essential and, indeed, overdue. The stock market has begun to place a premium on corporate disclosures that inspire trust. Government policy can, and should, reinforce this powerful market incentive.

**June 6, 2002**

**Memorandum From: Secretary of the Treasury, Paul O'Neill**
**To: President George W. Bush**

**RE: O'Neill's Trip to Africa**

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

June 6, 2002

SECRETARY OF THE TREASURY

**MEMORANDUM FOR THE PRESIDENT**

**FROM:** Paul H. O'Neill

**SUBJECT:** My Trip to Africa

I have just returned from eleven days in Africa, visiting Ghana, South Africa, Uganda, and Ethiopia May 20-31. I met with government officials, businessmen, farmers, market women, and students. I visited primary schools, universities, AIDS hospices, and private business firms. I ended my trip by addressing the Annual Meeting of the African Development Bank. I was accompanied by Bono, whose passion and commitment to attacking global poverty added a unique dimension to the trip.

My immediate purpose was to learn more about the development challenges that African countries face and to gather ideas about how we can make our development assistance more effective. I sought answers to some fundamental questions about poverty, development, and foreign aid. Why is economic growth and productivity so low? Why are so many people in Africa and elsewhere still living on less than a dollar a day? Why have aid programs made so little progress in raising growth and thereby reducing poverty? How do we better serve the mutual interest of developed and developing countries in promoting global peace, stability, and prosperity? Answers to these questions will help us as we begin to design the Millennium Challenge Account (MCA), reform the multilateral development banks (MDBs), improve our efforts in the global fight against HIV/AIDS, and strengthen our overall development agenda.

**Principal Observations**

At all stops I found a desire for a closer and more productive relationship with the United States, including not just financial aid, but dialogue, trade, investment, and technical assistance. I found strong support for the MCA and for our attempts to channel more MDB money in the form of grants. At the same time, I encountered strong criticism of the Farm Bill, with deep concern as to its impact on African farmers and the fight for global free trade. I observed an emerging consensus that real progress is possible only when there is effective African country leadership and commitment to results. When developing countries set their own agendas and define their own priorities, we can respond with support that can make a critical difference.

In all four of the countries I visited, I found leaders committed to a vision of development and searching for the means to carry it out. While the problems encountered and the progress achieved varied widely, broadly speaking they all aspire to the same policies that you have called for with the MCA:

- ruling justly -- by enforcing a rule of law, respect for human rights, and fighting corruption;

- encouraging economic freedom -- by creating more stable and accountable economic systems, reducing trade barriers, and encouraging private investment; and

- investing in people -- notably in providing better education, public health, and clean water.

**Some Successes, But We Can do Better**

I was encouraged by some of the things I saw that clearly were working, including many activities in which foreign assistance, both public and private, had played a role. Many people gave high praise to the role that USAID had played at various junctures in education, health, water supply, or other areas. I saw children receiving an education at schools that didn't exist five years ago. I saw HIV/AIDS clinics that were doing outstanding work in reducing suffering, prolonging life, and preventing mother-child transmission of HIV, including in some of the most unpromising circumstances imaginable. I saw communities that were undertaking self-help projects to dig a water bore hole or pave a muddy alley. I heard many requests for more US technical assistance in banking and finance, trade, business management, and business education.

Nevertheless, it is clear that a significant amount of the foreign aid that has been spent in the last three decades has failed to achieve strong results. It is unacceptable that at the dawn of the 21st century, nearly half the people of Africa still live on less than a dollar a day. The UN's Millennium Development Goals, which aim to double per capita incomes in the poorest countries and cut illiteracy in half by 2015, are not ambitious enough. It seems to me that aid donors and recipients alike need to set our goals higher, demand more in terms of measurable results, and expect those results to be achieved sooner. We need to find creative ways to better channel our aid resources to those who can get results. A critical part of the process should be closer consultation with Africans on what realistically can be done, and how to do it.

**Priorities for Assistance**

In assessing the areas where our support could make a visible, measurable difference in a short period of time, I would focus on three priorities:

- The plague of HIV/AIDS. South Africa has 4.2 million AIDS sufferers, the largest number in the world; Ethiopia's 3 million are the third largest. In all African countries except Ghana and Senegal, the numbers are rising rapidly, with potentially disastrous consequences for life expectancy, future economic growth, and the social fabric.

- Primary education. While most African countries are increasing their efforts and enrollment rates are rising, only Uganda has come close to achieving universal primary education, and the quality of education is an issue everywhere.

- Clean Water. Access to clean water ranges as low as 30% (in Ethiopia), and water-borne diseases remain a drain on productivity and the health of families everywhere. This is an area where we should be able to make the greatest difference in the shortest time.

When you have the time, I would like to talk with you regarding my ideas for an action agenda.

cc: Vice President Cheney
Secretary of State Powell
National Security Advisor Rice
Chief of Staff Card

**June 7, 2002**

**Memorandum From: Assistant Secretary For Financial Markets, Brian Roseboro**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: 2002 Debt Crisis - Need To Raise The Federal Government's Debt Ceiling.**

**Includes: Draft memo from O'Neill to President Bush on need to raise the det ceiling.**

DEPARTMENT OF THE TREASURY
WASHINGTON

ASSISTANT SECRETARY

June 7, 2002

**INFORMATION**

**MEMORANDUM FOR SECRETARY O'NEILL**

**FROM:** Brian Roseboro
Assistant Secretary for Financial Markets

**CC:** Peter Fisher
Under Secretary for Domestic Finance

**SUBJECT:** Debt Ceiling Meeting with the President (Monday, June 10)

**SUMMARY:**

This memo outlines the state of play on the debt ceiling regarding debt/cash forecasts and potential conflicts with OMB (Daniels) and WH staff (Lindsey and Bolten). You have received a parallel memo from Legislative Affairs.

Key development. Your draft memo to the President argued for extending the "debt issuance suspension period" to get past June 28. Based on new information, Treasury Legislative Affairs advised last night that if your proposal leaked out to the Hill, it would upset the Administration's legislative stratagem. We thus advise you not to send paper prior to meeting with the President.

**DISCUSSION:**

**Debt/cash situation**

1. **We can get to June 28 using just the tools we announced on May 14.** To date we have used the G-Fund and the Civil Service Retirement and Disability Fund (CSRDF). We also may have to use two tools we have also announced: the Exchange Stabilization Fund ($10 billion) and a swap between the CSRDF and the Federal Financing Bank ($6 billion). These are the same tools that Secretary Rubin used.

2. **Without further action, we cannot prudently get past June 28.** It could be impossible if, as we expect, tax receipts drop post June 17 versus static projections. If Congress does not act, we would only get past by extending the debt issuance suspension period beyond June 28 and taking additional measures never before used.

3. **Delay in resolving the issue before the last week of June will introduce uncertainty into our auction calendar.** If our legislative stratagem fails, this risk of uncertainty argues for announcing any additional measures before late June.

**Potential conflict with OMB and WH staff**

The following is our current and imperfect understanding. We (including Peter Fisher and David Aufhauser) will know more after a 10 am Monday staff meeting at the White House.

If the legislative stratagem fails and Congress does not act, everyone seems to agree that you should not set another specific deadline. The alternative is to set a new deadline with an implicit or explicit threat to default, and either bluff or mean it.

Everyone also seems to agree that at some point before June 28, you should send a letter to Congress extending the debt issuance suspension period for a long period. This extension would signal that there are no hard deadlines, thereby decoupling the debt ceiling from supplemental budget negotiations or other legislative leverage points.

The conflict apparently centers on whether the letter should:

- **Pledge to take "any and all measures necessary to protect the U.S. full faith and credit."** This statement would place the full faith and credit above game-playing. But WH staff and OMB argue that by shouldering this responsibility, you would remove the incentive for Congress to act and handicap the force of your or the President's calling in the future on Congress to fulfill their duty.

- **Extend the suspension period for 14 months or longer.**

    - Treasury General Counsel is preparing a legal justification for a 14 month extension. If Congress still fails to act by the time our resources are exhausted in August, you may be able to gain more time with further extension.

    - WH staff may argue for announcing a longer period now, with the goal of getting past the election or into the next Congress. Because the legal justification for this act is not yet clear, we are investigating other untested and untried devices to achieve the same effect. To prepare you, we are still completing a table with the impact of longer extensions. (WH staff have asked for this as well.)

- **Be sent soon or closer to June 28.** Because on current projections we anticipate staying under the ceiling until June 28 with no new measures, the timing of the letter is discretionary. Sending it:

    - Sooner would eliminate the risk of introducing uncertainty to financial markets or the government's finances and financial operations (e.g., initial check queuing on June 26-28).

    - Later (nearer June 28) would enhance the odds that Congress passes the legislation beforehand.

ATTACHMENTS: Most recent draft of memorandum from you to President
Draft letter from you to Congressional leaders
Treasury statements on May 14, 2002

June x, 2002

# Draft

SUBJECT: Debt Ceiling Strategy

**Purpose**

To outline strategy options regarding the debt ceiling.

**Recommendation**

That I send a letter to Congressional leaders which would:

(a) Re-state the Administration's request for a $750 billion debt ceiling increase;
(b) Extend use of a stopgap device needed to finance the government because Congress has not raised the ceiling; and
(c) Assert that Treasury will take all measures necessary to preserve the full faith and credit of the United States if Congress fails to act.

The impact of (c) would be to declare that we will not be held hostage by Congressional inaction on the debt ceiling, and that there will be no default or government shutdown.

**Background**

The statutory debt ceiling is now $5,950 billion. In December 2001, the Administration proposed raising the ceiling by $750 billion to accommodate the recession, stimulus bill, and other increased spending post-September 11.

At our urging, the House passed language as part of the supplemental that would help raise the ceiling. The Senate has not acted on the Administration's debt ceiling request. Senator Daschle has offered $450 billion as a stand-alone bill. He is also trying to extract higher overall discretionary spending in exchange for including the debt ceiling increase in the supplemental.

On May 16, Federal debt subject to limit reached the statutory ceiling of $5,950 billion. Treasury then began using stopgap devices to keep the debt below the ceiling. Absent other action, the steps I have taken to date will be exhausted as early as Thursday, June 13 and no later than Friday, June 28.

If Treasury exhausts all its stopgap devices (including those I have not yet used), I would have to choose among the following bad outcomes. My overriding goal is to avoid them at all costs.

- Inability to invest payments due to the trust funds (e.g., Social Security)

- Breach of the debt ceiling statute and issuance of legally suspect debt (because Treasury would have no clear statutory authority to borrow)
- Inability to pay bondholders and others due Federal payments (e.g., Social Security beneficiaries, government employees, defense contractors)

The Administration has implied in legislative communications that dire consequences will follow by June 28 if Congress does not act. Skeptical that June 28 is a hard deadline, Republican Congressional leaders have requested that we commit to a "true" hard deadline as a forcing device for Capitol Hill.

As noted, Treasury may exhaust its currently announced stopgap devices as early as June 13. To avoid the bad outcomes above, I plan to expand use of an existing device (extending a "debt issuance suspension period" – see attached draft letter). This act would open fresh borrowing capacity of approximately $120 billion, which would likely last no longer than mid-August.

With this act, I would have taken every step the Clinton Administration took in 1995-96. If the Congress still fails to act by the time our resources are exhausted in August, we may be able to gain more time with further extension of the debt suspension period. Congressional paralysis would also compel us to explore more novel mechanisms.

**Strategy choice**

If a Congressional deal is not struck in the next few days, there are three options: i) committing to protect the full faith and credit of the United States, ii) creating the appearance of a new hard deadline, and iii) creating a genuine hard deadline. I recommend the first option.

*1. Commit to protecting the full faith and credit of the United States.*

I recommend that I send a letter that extends the debt issuance suspension period, and commits the Treasury to whatever is necessary to protect the full faith and credit of the United States. In effect, this would mean there is no hard deadline.

The letter (draft attached) does not specify the additional measures that Treasury might use to avoid default. Untried and untested, the measures might carry legal risk. But none would be without support from government counsel.

- **Pro**: Places full faith and credit above game-playing. Eliminates/postpones urgency of raising the debt ceiling. Ends defensive Administration posture. Decouples debt ceiling from supplemental budget negotiations.

- **Con**: Reduces odds that Congress will pass an increase this year. If I have to use additional measures, they could invite legal challenge.

Unless Congress has reached a compromise beforehand, I would send the letter on Tuesday, June 11 or Wednesday, June 12.

2. *Continue to tell Congress that we have a hard deadline of June 28, but prepare to act if Congress does not.*

    - **Pro**: May deliver debt ceiling increase at lowest political and legal risk. Congressional leaders have requested we name a hard deadline to act as a forcing device for Capitol Hill.

    - **Con**: Unlikely to succeed because Congress suspects we have other stopgap devices. Risks Administration credibility if Congress calls this bluff. Disturbs financial markets.

    I judge this option too likely to fail.

3. *Set a genuine hard deadline, and commit to a bad outcome if Congress fails to act.*

    - **Pro**: Maximizes chances that Congress will pass debt ceiling increase by deadline.

    - **Con**: Opens Administration to charges of recklessness with government finances. Congress may also misread us and fail to act – triggering the bad outcomes.

    I counsel against making this ultimatum because the bad outcomes are too serious to contemplate.

# Draft

*Potential conflicts in brackets.*

Date TBD

[Addressee]

The Administration has requested over the past six months that Congress enact a permanent increase of $750 billion in the statutory debt ceiling.

My paramount responsibility as Secretary of the Treasury is to preserve the full faith and credit of the United States. I wish to be absolutely clear: I will [take any and all measures necessary to] fulfill that responsibility.

As early as June 13 the Treasury will likely exhaust the extraordinary actions that I informed you of on May 14 to preserve the government's finances. In light of the risks this exhaustion would present, I have determined under my statutory authority that a "debt issuance suspension period" of [fourteen months] exists through [August __, 2003]. Accordingly, the Treasury will partly suspend the Civil Service Retirement and Disability Fund's investments in Treasury securities, thereby reducing outstanding federal debt. The effect of this extension will be to open borrowing capacity sufficient for no longer than [a couple] months.

The Fund will be made whole once Congress has raised the ceiling, as required by law. Consistent with prior use of this authority, beneficiaries will be unaffected.

This declaration is consistent with past practice and precedent in 1995-96. It will also permit Congress more time to act on this necessary legislation.

I am taking this step to ensure that the federal government honors its financial commitments. By this action, the United States will be able to continue to wage war on terrorism, pay Social Security beneficiaries and Medicare and Medicaid recipients, and meet our obligations to bondholders.

I urge you to act promptly to approve the Administration's request.



TREASURY NEWS

**FROM THE OFFICE OF PUBLIC AFFAIRS**

FOR IMMEDIATE RELEASE
May 14, 2002
PO-3095

**The Honorable Tom Daschle**
**Majority Leader**
**United States Senate**
**Washington, DC 20510**

Dear Mr. Leader:

Absent other actions, the Federal government's debt subject to limit will rise above the current statutory ceiling of $5,950 billion no later than May 16. I am writing to inform you of actions the Treasury must take to avoid reaching the current statutory debt limit, and to reiterate the Administration's request for a permanent increase of $750 billion.

To manage debt subject to limit, the Treasury will initially take those extraordinary actions that it can reverse once the debt ceiling has been raised. First, Congress has explicitly authorized the Secretary of the Treasury to suspend or redeem investments in two funds for this purpose: the Government Securities Investment Fund of the Federal Employees Retirement System (G-Fund), and the Civil Service Retirement and Disability Fund (CSRDF). For purposes of these statutes, I have determined that a "debt issuance suspension period" will begin no later than May 16, 2002 and will last until June 28, 2002.

I am notifying you, as required under 5 U.S.C. § 8348 (l)(2) and 5 U.S.C. § 8438(h)(2), that by reason of the public debt limit, it is my determination that I will be unable to invest fully the portion of the CSRDF not immediately required to pay beneficiaries, and that I will be unable to invest fully the G-Fund. Therefore, during the debt issuance suspension period, I will redeem a portion of the investments held by the CSRDF, as authorized by law; and I will suspend the full investment of the G-Fund, as authorized by law. These actions will open an additional $44 billion in borrowing capacity under the limit. Beneficiaries will be fully protected and will suffer no adverse consequences. The statutes require that the Treasury restore all due interest and principal to these funds as soon as this can be done without exceeding the public debt limit.

Second, to reduce borrowing as much as possible during this period, the Treasury will actively manage and draw upon as needed all available cash resources, approximately $30 billion as of today, subject to the necessity of maintaining prudent cash balances to meet the government's payment obligations.

Based on current Treasury forecasts, these actions should be sufficient to enable us to finance the government's operations through mid-June. Uncertainty about projected debt subject to limit rises in the second half of June, in particular because of tax receipts due on June 17. During this period, as necessary, the Treasury will take further extraordinary actions that have been previously utilized under established legal authority. However, based on the information now available to me, these additional devices at my disposal will be insufficient to manage debt subject to limit beyond June 28. On June 28, Treasury must credit an interest payment of approximately $67 billion to various federal trust funds, including Social Security. This payment is projected to exceed Treasury's flexibility in managing debt subject to limit.

These devices could also be exhausted earlier than June 28 because of uncertainty associated with federal receipts in mid-June. I will alert you as soon as possible if that should prove to be the case.

However, in order to meet the government's payment obligations in the first week of July, sufficient confidence as to our sources of funding must be established by June 26 in order to ensure timely processing.

I again urge Congress to pass the President's request for a permanent $750 billion increase in the debt ceiling as soon as possible.

Sincerely,

Paul H. O'Neill



TREASURY NEWS

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**FROM THE OFFICE OF PUBLIC AFFAIRS**

FOR IMMEDIATE RELEASE
May 14, 2002
PO-3094

## TREASURY STATEMENT ON THE DEBT CEILING

Debt Ceiling Letter to Congress

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Today the Treasury informed Congress that, absent extraordinary actions, the government will exceed the statutory debt ceiling no later than May 16. The Treasury also informed Congress that a "debt issuance suspension period" will begin no later than May 16. Today's notification allows the Treasury to suspend or redeem investments in two trust funds, which will provide flexibility to fund the operations of the government during this period. The two funds are the Civil Service Retirement and Disability Fund (CSRDF) and the Government Securities Investment Fund of the Federal Employees Retirement System (G-Fund). Both funds will be restored in full as to principal and interest once the debt limit has been raised. There will be no effect on beneficiaries.

To reduce uncertainty over the Treasury's borrowing needs during this period, the Treasury also has announced the suspension of new issuance of State and Local Government Series (SLGS) Treasury securities effective May 15.

Based upon the latest projections, debt subject to the limit would rise above the current statutory limit of $5,950 billion no later than May 16 and remain at a level roughly $40 to 50 billion above the limit through mid-June. Suspending investments in the two federal trust funds will provide approximately $44 billion in borrowing capacity, of which $4 billion will come from the CSRDF and $40 billion will come from the G-Fund. In addition to managing debt subject to the limit during this period by suspending or redeeming investments in the two trust funds, the Treasury also will make use of available cash resources, including balances held at the Federal Reserve and deposits held at commercial banks by which the Treasury compensates the banks for services essential to the collection of government receipts. Making use of these balances will require the Treasury to make larger deposits in the future as compensation to the banks.

In the second half of June, uncertainty with respect to taxes to be received on June 17 increases the chances that additional measures will be necessary to manage debt subject to the limit. These measures are the suspension of U.S. dollar investments in the Exchange Stabilization Fund, and a swap of non-Treasury securities held by the Federal Financing Bank for an equivalent value of Treasury securities held by CSRDF. The Treasury is not authorized to restore the funds with interest once the debt ceiling is

raised; these funds can only be fully restored through congressional action.

Collectively, the devices announced today - and those that could become necessary in June -will add a total of roughly $80 billion to the Treasury's borrowing capacity. All of these devices were used previously by Treasury in 1995 and 1996.

The Treasury faces obligations in late June that, on the basis of current projections, cannot be surmounted without an increase in the statutory debt limit. On June 28, the Treasury must credit an interest payment of approximately $67 billion to the Social Security and other federal trust funds that, on current projections, will result in an increase of debt subject to limit to almost $100 billion over the current statutory ceiling. In addition, the Treasury is scheduled to make $54 billion in payments between July 1 and 3, including approximately $30 billion of payments to trust fund beneficiaries. Lack of certainty by June 26 as to how the Treasury will fund these payments will challenge the Treasury's ability to ensure timely processing of payments to Social Security and other beneficiaries.

The Treasury would normally announce on June 19 the size of the 2-year note auction scheduled for June 26. Particularly in light of the risk that the Treasury will draw down compensating balances before the last week of June, this 2-year note auction will be an important source of funds for the payment obligations scheduled for the first week of July. If the debt ceiling has not been raised prior to June 19, the Treasury may need to delay the announcement of the size of the auction, announce the auction subject to cancellation, or both.

The Treasury Department requests that Congress pass the President's request for a permanent $750 billion increase in the debt ceiling as soon as possible.

July 22, 2002

Memorandum

From: Donald Rumsfeld
To: Defense Department Chiefs

SUBJECT: The Impact of Leaking Classified Information; Attached CIA memo on effect of leaks

**July 12, 2002 11:58 AM**

TO: Deputy Secretary of Defense
Secretaries of the Military Departments
Chairman of the Joint Chiefs of Staff
Vice Chairman of the Joint Chiefs of Staff
Undersecretaries of Defense
Military Chiefs of Staff
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant Secretary of Defense for Public Affairs
Director of the Joint Staff

FROM: Donald Rumsfeld

SUBJECT: The Impact of Leaking Classified Information

I have spoken publicly and privately, countless times, about the danger of leaking classified information. It is wrong. It is against the law. It costs the lives of Americans. It diminishes our country's chance for success.

Attached is an unclassified CIA assessment of the impact of leaks on the global war on terrorism. The disclosure of classified information is damaging our country's ability to stop terrorist acts and is putting American lives at risk.

Your leadership is needed to help stop leaks. Please meet with your staff to discuss the seriousness of the damaging lack of professionalism we continue to see on a daily basis.

Please let Larry Di Rita know after you have had the discussion with your staff of any feedback you feel would be helpful.

Thanks.

Attach.
06/14/02 CIA Memorandum

DHR:dh
062802-1

U11159 /02

SECDEF HAS SEEN
JUN 17 2002

(C)

14 June 2002

Memorandum

***In response to a request for unclassified information regarding the impact of leaks on the war against terrorism:***

Al-Qa'ida is a savvy, experienced terrorist organization that has watched the US for years, and it pays close attention to publicly available information that will help it evade US intelligence. ***A growing body of reporting indicates that al-Qa'ida planners have learned much about our counterterrorist intelligence capabilities from US and foreign media.***

— Information obtained from captured detainees has revealed that al-Qa'ida operatives are extremely security conscious and have altered their practices in response to what they have learned from the press about our capabilities. (U)

The cumulative effect of public disclosures of classified, terrorism-related information—including significant losses from such disclosures predating 11 September—has jeopardized highly fragile and very sensitive intelligence capabilities that we require for the successful prosecution of the war against terrorism.

— Disclosures of classified information also reduce the willingness of potential allies, volunteers, and sources in foreign countries to work with us out of fear of having their cooperation publicized in the press. (U)

When lost, we attempt to rebuild these capabilities and relationships when we can, but these efforts take time and are expensive. (U)

CIA

**August 1, 2002**

**Department of Justice Memorandum**

**FROM: Deputy Assistant Attorney General John C. Yoo**
**TO: White House Counsel Alberto R. Gonzales**

**RE: Interrogation methods used on al Qaeda prisoners**

**U.S. Department of Justice**

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

*Washington, D.C. 20530*

August 1, 2002

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C.

Dear Judge Gonzales:

You have requested the views of our Office concerning the legality, under international law, of interrogation methods to be used during the current war on terrorism. More specifically, you have asked whether interrogation methods used on captured al Qaeda operatives, which do not violate the prohibition on torture found in 18 U.S.C. § 2340-2340A, would either: a) violate our obligations under the Torture Convention,[1] or b) create the basis for a prosecution under the Rome Statute establishing the International Criminal Court (ICC).[2] We believe that interrogation methods that comply with § 2340 would not violate our international obligations under the Torture Convention, because of a specific understanding attached by the United States to its instrument of ratification. We also conclude that actions taken as part of the interrogation of al Qaeda operatives cannot fall within the jurisdiction of the ICC, although it would be impossible to control the actions of a rogue prosecutor or judge. This letter summarizes our views; a memorandum opinion will follow that will more fully explain our reasoning.

I.

Section 2340A makes it a criminal offense for any person "outside the United States [to] commit[] or attempt[] to commit torture."[3] The act of torture is defined as an:

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[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ,adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987)

[2] U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter ICC Statute].

[3] If convicted of torture, a defendant faces a fine or up to twenty years' imprisonment or both. If, however, the act resulted in the victim's death, a defendant may be sentenced to life imprisonment or to death. *See* 18 U.S.C.A. § 2340A(a). Whether death results from the act also affects the applicable statute of limitations. Where death does not result, the statute of limitations is eight years; if death results, there is no statute of limitations. *See* 18 U.S.C.A. § 3286(b) (West Supp. 2002); *id.* § 2332b(g)(5)(B) (West Supp. 2002). Section 2340A as originally enacted did not provide for the death penalty as a punishment. *See* Omnibus Crime Bill, Pub. L. No.103-322, Title VI, Section 60020, 108 Stat. 1979 (1994) (amending section 2340A to provide for the death penalty); H. R. Conf. Rep. No. 103-711, at 388 (1994) (noting that the act added the death penalty as a penalty for torture).

Most recently, the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), amended section 2340A to expressly codify the offense of conspiracy to commit torture. Congress enacted this amendment as part of a broader

> act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.

18 U.S.C.A. § 2340(1); *see id.* § 2340A. Thus, to convict a defendant of torture, the prosecution must establish that: (1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) that the act inflicted severe physical or mental pain or suffering. *See also* S. Exec. Rep. No. 101-30, at 6 (1990) ("For an act to be 'torture,' it must . . . cause severe pain and suffering, and be intended to cause severe pain and suffering."). As we have explained elsewhere, in order to violate the statute a defendant must have specific intention to inflict severe pain or suffering – in other words, "the infliction of such pain must be the defendant's precise objective." See Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under under 18 U.S.C. §§ 2340-2340A* at 3 (August 1, 2002).

Section 2340 further defines "severe mental pain or suffering" as:

> the prolonged mental harm caused by or resulting from—
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2). As we have explained, in order to inflict severe mental or suffering, a defendant both must commit one of the four predicate acts, such as threatening imminent death, and intend to cause "prolonged mental harm."

II.

You have asked whether interrogation methods used on al Qaeda operatives that comply with 18 U.S.C. §§ 2340-2340A nevertheless could violate the United States' obligations under the Torture Convention. The Torture Convention defines torture as:

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effort to ensure that individuals engaged in the planning of terrorist activities could be prosecuted irrespective of where the activities took place. *See* H. R. Rep. No. 107-236, at 70 (2001) (discussing the addition of "conspiracy" as a separate offense for a variety of "Federal terrorism offense[s]").

> any act by which *severe* pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Article 1(1) (emphasis added).

Despite the apparent differences in language between the Convention and § 2340, international law clearly could not hold the United States to an obligation different than that expressed in § 2340. When it acceded to the Convention, the United States attached to its instrument of ratification a clear understanding that defined torture in the exact terms used by § 2340. The first Bush administration submitted the following understanding of the treaty:

> The United States understands that, in order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental pain caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36. The Senate approved the Convention based on this understanding, and the United States included the understanding in its instrument of ratification.[4]

This understanding accomplished two things. First, it made crystal clear that the intent requirement for torture was specific intent. By its terms, the Torture Convention might be read to require only general intent although we believe the better argument is that that the Convention's use of the phrase "intentionally inflicted" also created a specific intent-type standard. Second, it added form and substance to the otherwise amorphous concept of *mental* pain or suffering. In so doing, this understanding ensured that mental torture would rise to a severity comparable to that required in the context of physical torture.

It is one of the core principles of international law that in treaty relations a nation is not bound without its consent. Under international law, a reservation made when ratifying a treaty validly alters or modifies the treaty obligation, subject to certain conditions that will be discussed below. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); 1 Restatement of the Law (Third) of the Foreign Relations Law of the

[4] *See* http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html.

United States § 313 (1987).[5] The right to enter reservations applies to multilateral international agreements just as in the more familiar context of bilateral agreements. *Id.* Under international law, therefore, the United States thus is bound only by the text of the Torture Convention as modified by the first Bush administration's understanding.[6] As is obvious from its text, Congress codified the understanding almost verbatim when it enacted § 2340. The United States' obligation under the Torture Convention is thus identical to the standard set by § 2340. Conduct that does not violate the latter does not violate the former. Put another way, so long as the interrogation methods do not violate § 2340, they also do not violate our international obligations under the Torture Convention.

Although the Vienna Convention on Treaties recognizes several exceptions to the right to make reservations, none of them apply here.[7] First, a reservation is valid and effective unless it purports to defeat the object and purpose of the treaty. Vienna Convention, art. 19. Our initial research indicates that international law has provided little guidance regarding the meaning of the "object and purpose" test. Nonetheless, it is clear that here the United States had not defeated the object and purpose of the Torture Convention. The United States nowhere reserved the right to conduct torture; in fact, it enacted Section 2340 to expand the prohibition on torture in its domestic criminal law. Rather than defeat the object of the Torture Convention, the United States simply accepted its prohibition and attempted, through the Bush administration's understanding, to make clear the scope and meaning of the treaty's obligations.

Second, a treaty reservation will not be valid if the treaty itself prohibits states from taking reservations. The Torture Convention nowhere prohibits state parties from entering reservations. To be sure, two provisions of the Torture Convention – the competence of the Committee Against Torture, art. 28, and the mandatory jurisdction of the International Court of Justice, art. 30 – specifically note that nations may take reservations from their terms. Nonetheless, the Convention contains no provision that explicitly attempts to preclude states from exercising their basic right under international law to enter reservations to other provisions. Without such a provision, we do not believe that the Torture Convention precludes reservations.

Third, in regard to multilateral agreements, a treaty reservation may not be valid if it is objected to in a timely manner by other states. Vienna Convention art. 20. If another state does not object within a certain period of time, it is deemed to have acquiesced in the reservation. Even if, however, another nation objects, that only means that the provision of the treaty to which the reservation applies is not in force between the two nations – unless the objecting nation opposes entry into force of the treaty as a whole between the two nations. *Id.* art 21(3). Here, no nation appears to have objected to the United States' further definition of torture. Only

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[5] Although, under domestic law, the Bush administration's definition of torture was categorized as an "understanding," it was deposited with the instrument of ratification as a condition of the United States' ratification, and so under international law we consider it to be a reservation if it indeed modifies the Torture Convention standard. *See* Restatement (Third) at § 313 cmt. g.

[6] Further, if we are correct in our suggestion that the Torture Convention itself creates a heightened intent standard, then the understanding attached by the Bush Administration is less a modification of the Convention's obligations and more of an explanation of how the United States would implement its somewhat ambiguous terms.

[7] It should be noted that the United States is not a signatory to the Vienna Convention, although it has said that it considers some of its provisions to be customary international law.

one nation, Germany appears to have commented on the United States' reservations, and even Germany did not oppose any U.S. reservation outright.

Thus, we conclude that the Bush administration's understanding created a valid and effective reservation to the Torture Convention. Even if it were otherwise, there is no international court to review the conduct of the United States under the Convention. In an additional reservation, the United States refused to accept the jurisdiction of the ICJ (which, in any event, could hear only a case brought by another state, not by an individual) to adjudicate cases under the Convention. Although the Convention creates a Committee to monitor compliance, it can only conduct studies and has no enforcement powers.

III.

You have also asked whether interrogations of al Qaeda operatives could be subject to criminal investigation and prosecution by the ICC. We believe that the ICC cannot take action based on such interrogations.

First, as noted earlier, one of the most established principles of international law is that a state cannot be bound by treaties to which it has not consented. Although President Clinton signed the Rome Statute, the United States has withdrawn its signature from the agreement before submitting it to the Senate for advice and consent – effectively terminating it. The United States, therefore, cannot be bound by the provisions of the ICC Treaty nor can U.S. nationals be subject to ICC prosecution. We acknowledge, however, that the binding nature of the ICC treaty on non-parties is a complicated issue and do not attempt to definitively answer it here.

Second, even if the ICC could in some way act upon the United States and its citizens, interrogation of an al Qaeda operative could not constitute a crime under the Rome Statute. Even if certain interrogation methods being contemplated amounted to torture (and we have no facts that indicate that they would), the Rome Statute makes torture a crime subject to the ICC's jurisdiction in only two contexts. Under article 7 of the Rome Statute, torture may fall under the ICC's jurisdiction as a crime against humanity if it is committed as "part of a widespread and systematic attack directed against any civilian population." Here, however, the interrogation of al Qaeda operatives is not occurring as part of such an attack. The United States' campaign against al Qaeda is an attack on a non-state terrorist organization, not a civilian population. If anything, the interrogations are taking place to elicit information that could prevent attacks on civilian populations.

Under article 8 of the Rome statute, torture can fall within the ICC's jurisdiction as a war crime. In order to constitute a war crime, torture must be committed against "persons or property protected under the provisions of the relevant Geneva Conventions." Rome Statute, art. 8. On February 27, 2002, the President determined that neither members of the al Qaeda terrorist network nor Taliban soldiers were entitled to the legal status of prisoners of war under the Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3517 ("GPW"). As we have explained elsewhere, members of al Qaeda cannot receive the protections accorded to POWs under GPW because al Qaeda is a non-state terrorist organization that has not signed the Conventions. Memorandum for Alberto R. Gonzales, Counsel to the President and William J.

Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 8 (Jan. 22, 2002). The President has appropriately determined that al Qaeda members are not POWs under the GPW, but rather are illegal combatants, who are not entitled to the protections of any of the Geneva Conventions. Interrogation of al Qaeda members, therefore, cannot constitute a war crime because article 8 of the Rome Statute applies only to those protected by the Geneva Conventions.

We cannot guarantee, however, that the ICC would decline to investigate and prosecute interrogations of al Qaeda members. By the terms of the Rome Statute, the ICC is not checked by any other international body, not to mention any democratically-elected or accountable one. Indeed, recent events indicate that some nations even believe that the ICC is not subject to the authority of the United Nations Security Council. It is possible that an ICC official would ignore the clear limitations imposed by the Rome Statute, or at least disagree with the President's interpretation of GPW. Of course, the problem of the "rogue prosecutor" is not limited to questions about the interrogation of al Qaeda operatives, but is a potential risk for any number of actions that have been undertaken during the Afghanistan campaign, such as the collateral loss of civilian life in the bombing of legitimate military targets. Our Office can only provide the best reading of international law on the merits. We cannot predict the political actions of international institutions.

Please let us know if we can be of further assistance.

Sincerely,

John C. Yoo
Deputy Assistant Attorney General

August 1, 2002

Department of Justice Memorandum

TO: White House Counsel Alberto Gonzales
FROM: Attorney General Jay S. Bybee

RE: Definition of torture; 1984 Torture Convention

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

*Washington, D.C. 20530*

August 1, 2002

**Memorandum for Alberto R. Gonzales**
**Counsel to the President**

*Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A*

You have asked for our Office's views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340–2340A of title 18 of the United States Code. As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States. We conclude below that Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture. We conclude by examining possible defenses that would negate any claim that certain interrogation methods violate the statute.

In Part I, we examine the criminal statute's text and history. We conclude that for an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party. The legislative history simply reveals that Congress intended for the statute's definition to track the Convention's definition of torture and the reservations, understandings, and declarations that the United States submitted with its ratification. We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.

In Part II, we examine the text, ratification history, and negotiating history of the Torture Convention. We conclude that the treaty's text prohibits only the most extreme

acts by reserving criminal penalties solely for torture and declining to require such penalties for "cruel, inhuman, or degrading treatment or punishment." This confirms our view that the criminal statute penalizes only the most egregious conduct. Executive branch interpretations and representations to the Senate at the time of ratification further confirm that the treaty was intended to reach only the most extreme conduct.

In Part III, we analyze the jurisprudence of the Torture Victims Protection Act, 28 U.S.C. § 1350 note (2000), which provides civil remedies for torture victims, to predict the standards that courts might follow in determining what actions reach the threshold of torture in the criminal context. We conclude from these cases that courts are likely to take a totality-of-the-circumstances approach, and will look to an entire course of conduct, to determine whether certain acts will violate Section 2340A. Moreover, these cases demonstrate that most often torture involves cruel and extreme physical pain. In Part IV, we examine international decisions regarding the use of sensory deprivation techniques. These cases make clear that while many of these techniques may amount to cruel, inhuman or degrading treatment, they do not produce pain or suffering of the necessary intensity to meet the definition of torture. From these decisions, we conclude that there is a wide range of such techniques that will not rise to the level of torture.

In Part V, we discuss whether Section 2340A may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers. We find that in the circumstances of the current war against al Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war. In Part VI, we discuss defenses to an allegation that an interrogation method might violate the statute. We conclude that, under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A.

## I. 18 U.S.C. §§ 2340–2340A

Section 2340A makes it a criminal offense for any person "outside the United States [to] commit[] or attempt[] to commit torture."[1] Section 2340 defines the act of torture as an:

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[1] If convicted of torture, a defendant faces a fine or up to twenty years' imprisonment or both. If, however, the act resulted in the victim's death, a defendant may be sentenced to life imprisonment or to death. *See* 18 U.S.C.A. § 2340A(a). Whether death results from the act also affects the applicable statute of limitations. Where death does not result, the statute of limitations is eight years; if death results, there is no statute of limitations. *See* 18 U.S.C.A. § 3286(b) (West Supp. 2002); *id.* § 2332b(g)(5)(B) (West Supp. 2002). Section 2340A as originally enacted did not provide for the death penalty as a punishment. *See* Omnibus Crime Bill, Pub. L. No.103-322, Title VI, Section 60020, 108 Stat. 1979 (1994) (amending section 2340A to provide for the death penalty); H. R. Conf. Rep. No. 103-711, at 388 (1994) (noting that the act added the death penalty as a penalty for torture).

Most recently, the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), amended section 2340A to expressly codify the offense of conspiracy to commit torture. Congress enacted this amendment as part of a broader effort to ensure that individuals engaged in the planning of terrorist activities could be prosecuted irrespective of where the activities took place. *See* H. R. Rep. No. 107-236, at 70 (2001)

> act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.

18 U.S.C.A. § 2340(1); *see id.* § 2340A. Thus, to convict a defendant of torture, the prosecution must establish that: (1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) that the act inflicted severe physical or mental pain or suffering. *See also* S. Exec. Rep. No. 101-30, at 6 (1990) ("For an act to be 'torture,' it must . . . cause severe pain and suffering, and be intended to cause severe pain and suffering."). You have asked us to address only the elements of specific intent and the infliction of severe pain or suffering. As such, we have not addressed the elements of "outside the United States," "color of law," and "custody or control."[2] At your request, we would be happy to address these elements in a separate memorandum.

**A. "Specifically Intended"**

To violate Section 2340A, the statute requires that severe pain and suffering must be inflicted with specific intent. *See* 18 U.S.C. § 2340(1). In order for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act. *See United States v. Carter*, 530 U.S. 255, 269 (2000); Black's Law Dictionary at 814 (7th ed. 1999) (defining specific intent as "[t]he intent to accomplish the precise criminal act that one is later charged with"). For example, in *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994), the statute at issue was construed to require that the defendant act with the "specific intent to commit the crime." (Internal quotation marks and citation omitted). As a result, the defendant had to act with the express "purpose to disobey the law" in order for the *mens rea* element to be satisfied. *Ibid.* (internal quotation marks and citation omitted)

Here, because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective. If the statute had required only general intent, it would be sufficient to establish guilt by showing that the defendant "possessed knowledge with respect to the *actus reus* of the crime." *Carter*, 530 U.S. at 268. If the defendant acted knowing that severe pain or

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(discussing the addition of "conspiracy" as a separate offense for a variety of "Federal terrorism offense[s]").

[2] We note, however, that 18 U.S.C. § 2340(3) supplies a definition of the term "United States." It defines it as "all areas under the jurisdiction of the United States including any of the places described in" 18 U.S.C. §§ 5 and 7, and in 49 U.S.C. § 46501(2). Section 5 provides that United States "includes all places and waters, continental or insular, subject to the jurisdiction of the United States." By including the definition set out in Section 7, the term "United States" as used in Section 2340(3) includes the "special maritime and territorial jurisdiction of the United States." Moreover, the incorporation by reference to Section 46501(2) extends the definition of the "United States" to "special aircraft jurisdiction of the United States."

suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent. *See id.* at 269; Black's Law Dictionary 813 (7th ed. 1999) (explaining that general intent "usu[ally] takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)"). The Supreme Court has used the following example to illustrate the difference between these two mental states:

> [A] person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying "general intent"), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy "specific intent").

*Carter*, 530 U.S. at 268 (citing 1 W. LaFave & A. Scott, Substantive Criminal Law § 3.5, at 315 (1986)).

As a theoretical matter, therefore, knowledge alone that a particular result is certain to occur does not constitute specific intent. As the Supreme Court explained in the context of murder, "the . . . common law of homicide distinguishes . . . between a person who knows that another person will be killed as a result of his conduct and a person who acts with the specific purpose of taking another's life[.]" *United States v. Bailey*, 444 U.S. 394, 405 (1980). "Put differently, the law distinguishes actions taken 'because of' a given end from actions taken 'in spite of their unintended but foreseen consequences.'" *Vacco v. Quill*, 521 U.S. 793, 802–03 (1997). Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control. While as a theoretical matter such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present. *See, e.g., United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001); *United States v. Karro*, 257 F.3d 112, 118 (2d Cir. 2001); *United States v. Wood*, 207 F.3d 1222, 1232 (10th Cir. 2000); *Henderson v. United States*, 202 F.2d 400, 403 (6th Cir.1953). Therefore, when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent.

Further, a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent. *See, e.g., South Atl. Lmtd. Ptrshp. of Tenn. v. Reise*, 218 F.3d 518, 531 (4th Cir. 2002). Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct. *See Cheek v. United States*, 498 U.S. 192, 202 (1991); *United States v. Mancuso*, 42 F.3d 836, 837 (4th Cir. 1994). For example, in the context of mail fraud, if an individual honestly believes that the material transmitted is truthful, he has not acted with the required intent to deceive or mislead. *See, e.g., United States v. Sayakhom*, 186

F.3d 928, 939–40 (9th Cir. 1999). A good faith belief need not be a reasonable one. *See Cheek*, 498 U.S. at 202.

Although a defendant theoretically could hold an unreasonable belief that his acts would not constitute the actions prohibited by the statute, even though they would as a certainty produce the prohibited effects, as a matter of practice in the federal criminal justice system it is highly unlikely that a jury would acquit in such a situation. Where a defendant holds an unreasonable belief, he will confront the problem of proving to the jury that he actually held that belief. As the Supreme Court noted in *Cheek*, "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury . . . will find that the Government has carried its burden of proving" intent. *Id.* at 203–04. As we explained above, a jury will be permitted to infer that the defendant held the requisite specific intent. As a matter of proof, therefore, a good faith defense will prove more compelling when a reasonable basis exists for the defendant's belief.

**B. "Severe Pain or Suffering"**

The key statutory phrase in the definition of torture is the statement that acts amount to torture if they cause "severe physical or mental pain or suffering." In examining the meaning of a statute, its text must be the starting point. *See INS v. Phinpathya*, 464 U.S. 183, 189 (1984) ("This Court has noted on numerous occasions that in all cases involving statutory construction, our starting point must be the language employed by Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.") (internal quotations and citations omitted). Section 2340 makes plain that the infliction of pain or suffering per se, whether it is physical or mental, is insufficient to amount to torture. Instead, the text provides that pain or suffering must be "severe." The statute does not, however, define the term "severe." "In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The dictionary defines "severe" as "[u]nsparing in exaction, punishment, or censure" or "[I]nflicting discomfort or pain hard to endure; sharp; afflictive; distressing; violent; extreme; as *severe* pain, anguish, torture." Webster's New International Dictionary 2295 (2d ed. 1935); *see* American Heritage Dictionary of the English Language 1653 (3d ed. 1992) ("extremely violent or grievous: *severe* pain") (emphasis in original); IX The Oxford English Dictionary 572 (1978) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "of circumstances . . .: hard to sustain or endure"). Thus, the adjective "severe" conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.

Congress's use of the phrase "severe pain" elsewhere in the United States Code can shed more light on its meaning. *See, e.g., West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) ("[W]e construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law."). Significantly, the phrase "severe pain" appears in statutes defining an emergency medical condition for the purpose of providing health benefits. *See, e.g.*, 8 U.S.C. § 1369 (2000); 42 U.S.C § 1395w-22 (2000); *id.* § 1395x (2000); *id.* §

1395dd (2000); *id.* § 1396b (2000); *id.* § 1396u-2 (2000). These statutes define an emergency condition as one "manifesting itself by acute symptoms of sufficient severity (including *severe pain*) such that a prudent lay person, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in—placing the health of the individual . . . (i) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part." *Id.* § 1395w-22(d)(3)(B) (emphasis added). Although these statutes address a substantially different subject from Section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain. They treat severe pain as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment. Such damage must rise to the level of death, organ failure, or the permanent impairment of a significant body function. These statutes suggest that "severe pain," as used in Section 2340, must rise to a similarly high level—the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture.[3]

### C. "Severe mental pain or suffering"

Section 2340 gives further guidance as to the meaning of "severe mental pain or suffering," as distinguished from severe physical pain and suffering. The statute defines "severe mental pain or suffering" as:

> the prolonged mental harm caused by or resulting from—
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or

[3] One might argue that because the statute uses "or" rather than "and" in the phrase "pain or suffering" that "severe physical suffering" is a concept distinct from "severe physical pain." We believe the better view of the statutory text is, however, that they are not distinct concepts. The statute does not define "severe mental pain" and "severe mental suffering" separately. Instead, it gives the phrase "severe mental pain or suffering" a single definition. Because "pain or suffering" is single concept for the purposes of "severe mental pain or suffering," it should likewise be read as a single concept for the purposes of severe physical pain or suffering. Moreover, dictionariesdefine the words "pain" and "suffering" in terms of each other. *Compare, e.g.*, Webster's Third New International Dictionary 2284 (1993) (defining suffering as "the endurance of . . . pain" or "a pain endured"); Webster's Third New International Dictionary 2284 (1986) (same); XVII The Oxford English Dictionary 125 (2d ed. 1989) (defining suffering as "the bearing or undergoing of pain"); *with, e.g.*,Random House Webster's Unabridged Dictionary 1394 (2d ed. 1999) (defining "pain" as "physical suffering"); The American Heritage Dictionary of the English Language 942 (College ed. 1976) (defining pain as "suffering or distress"). Further, even if we were to read the infliction of severe physical suffering as distinct from severe physical pain, it is difficult to conceive of such suffering that would not involve severe physical pain. Accordingly, we conclude that "pain or suffering" is a single concept within the definition of Section 2340.

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2). In order to prove "severe mental pain or suffering," the statute requires proof of "prolonged mental harm" that was caused by or resulted from one of four enumerated acts. We consider each of these elements.

*1. "Prolonged Mental Harm"*

As an initial matter, Section 2340(2) requires that the severe mental pain must be evidenced by "prolonged mental harm." To prolong is to "lengthen in time" or to "extend the duration of, to draw out." Webster's Third New International Dictionary 1815 (1988); Webster's New International Dictionary 1980 (2d ed. 1935). Accordingly, "prolong" adds a temporal dimension to the harm to the individual, namely, that the harm must be one that is endured over some period of time. Put another way, the acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage. For example, the mental strain experienced by an individual during a lengthy and intense interrogation—such as one that state or local police might conduct upon a criminal suspect—would not violate Section 2340(2). On the other hand, the development of a mental disorder such as posttraumatic stress disorder, which can last months or even years, or even chronic depression, which also can last for a considerable period of time if untreated, might satisfy the prolonged harm requirement. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 426, 439–45 (4th ed. 1994) ("DSM-IV"). *See also* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 509 (1997) (noting that posttraumatic stress disorder is frequently found in torture victims); *cf.* Sana Loue, *Immigration Law and Health* § 10:46 (2001) (recommending evaluating for post-traumatic stress disorder immigrant-client who has experienced torture).[4] By contrast to "severe pain," the phrase "prolonged mental harm" appears nowhere else in the U.S. Code nor does it appear in relevant medical literature or international human rights reports.

[4] The DSM-IV explains that posttraumatic disorder ("PTSD") is brought on by exposure to traumatic events, such as serious physical injury or witnessing the deaths of others and during those events the individual felt "intense fear" or "horror." *Id.* at 424. Those suffering from this disorder reexperience the trauma through, *inter alia*, "recurrent and intrusive distressing recollections of the event," "recurrent distressing dreams of the event," or "intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event." *Id.* at 428. Additionally, a person with PTSD "[p]ersistent[ly]" avoids stimuli associated with the trauma, including avoiding conversations about the trauma, places that stimulate recollections about the trauma; and they experience a numbing of general responsiveness, such as a "restricted range of affect (e.g., unable to have loving feelings)," and "the feeling of detachment or estrangement from others." *Ibid.* Finally, an individual with PTSD has "[p]ersistent symptoms of increased arousal," as evidenced by "irritability or outbursts of anger," "hypervigilance," "exaggerated startle response," and difficulty sleeping or concentrating. *Ibid.*

Not only must the mental harm be prolonged to amount to severe mental pain and suffering, but also it must be caused by or result from one of the acts listed in the statute. In the absence of a catchall provision, the most natural reading of the predicate acts listed in Section 2340(2)(A)–(D) is that Congress intended it to be exhaustive. In other words, other acts not included within Section 2340(2)'s enumeration are not within the statutory prohibition. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius.*"); Norman Singer, 2A Sutherland on Statutory Construction § 47.23 (6th ed. 2000) ("[W]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.") (footnotes omitted). We conclude that torture within the meaning of the statute requires the specific intent to cause prolonged mental harm by one of the acts listed in Section 2340(2).

A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture. It could be argued that a defendant needs to have specific intent only to commit the predicate acts that give rise to prolonged mental harm. Under that view, so long as the defendant specifically intended to, for example, threaten a victim with imminent death, he would have had sufficient *mens rea* for a conviction. According to this view, it would be further necessary for a conviction to show only that the victim factually suffered prolonged mental harm, rather than that the defendant intended to cause it. We believe that this approach is contrary to the text of the statute. The statute requires that the defendant specifically intend to inflict severe mental pain or suffering. Because the statute requires this mental state with respect to the infliction of severe mental pain, and because it expressly defines severe mental pain in terms of prolonged mental harm, that mental state must be present with respect to prolonged mental harm. To read the statute otherwise would read the phrase "the prolonged mental harm caused by or resulting from" out of the definition of "severe mental pain or suffering."

A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not amount to the acts prohibited by the statute. Thus, if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture. A defendant could show that he acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience. *See, e.g., Ratzlaf*, 510 U.S. at 142 n.10 (noting that where the statute required that the defendant act with the specific intent to violate the law, the specific intent element "might be negated by, e.g., proof that defendant relied in good faith on advice of counsel.") (citations omitted). All of these steps would show that he has drawn on the relevant body of knowledge concerning the result proscribed that the statute, namely prolonged mental harm. Because the presence of good faith would negate the specific intent element of torture, it is a complete defense to such a charge. *See, e.g., United States v. Wall*, 130 F.3d 739, 746 (6th Cir. 1997); *United States v. Casperson*, 773 F.2d 216, 222–23 (8th Cir.1985).

*2. Harm Caused By Or Resulting From Predicate Acts*

Section 2340(2) sets forth four basic categories of predicate acts. First in the list is the "intentional infliction or threatened infliction of severe physical pain or suffering." This might at first appear superfluous because the statute already provides that the infliction of severe physical pain or suffering can amount to torture. This provision, however, actually captures the infliction of physical pain or suffering when the defendant inflicts physical pain or suffering with general intent rather than the specific intent that is required where severe physical pain or suffering alone is the basis for the charge. Hence, this subsection reaches the infliction of severe physical pain or suffering when it is but the means of causing prolonged mental harm. Or put another way, a defendant has committed torture when he intentionally inflicts severe physical pain or suffering with the specific intent of causing prolonged mental harm. As for the acts themselves, acts that cause "severe physical pain or suffering" can satisfy this provision.

Additionally, the threat of inflicting such pain is a predicate act under the statute. A threat may be implicit or explicit. *See, e.g., United States v. Sachdev*, 279 F.3d 25, 29 (1st Cir. 2002). In criminal law, courts generally determine whether an individual's words or actions constitute a threat by examining whether a reasonable person in the same circumstances would conclude that a threat had been made. *See, e.g., Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that whether a statement constituted a threat against the president's life had to be determined in light of all the surrounding circumstances); *Sachdev*, 279 F.3d at 29 ("a reasonable person in defendant's position would perceive there to be a threat, explicit, or implicit, of physical injury"); *United States v. Khorrami*, 895 F.2d 1186, 1190 (7th Cir. 1990) (to establish that a threat was made, the statement must be made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon [another individual]") (citation and internal quotation marks omitted); *United States v. Peterson*, 483 F.2d 1222, 1230 (D.C. Cir. 1973) (perception of threat of imminent harm necessary to establish self-defense had to be "objectively reasonable in light of the surrounding circumstances"). Based on this common approach, we believe that the existence of a threat of severe pain or suffering should be assessed from the standpoint of a reasonable person in the same circumstances.

Second, Section 2340(2)(B) provides that prolonged mental harm, constituting torture, can be caused by "the administration or application or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality." The statute provides no further definition of what constitutes a mind-altering substance. The phrase "mind-altering substances" is found nowhere else in the U.S. Code nor is it found in dictionaries. It is, however, a commonly used synonym for drugs. *See, e.g., United States v. Kingsley*, 241 F.3d 828, 834 (6th Cir.) (referring to controlled substances as "mind-altering substance[s]") *cert. denied*, 122 S. Ct. 137 (2001); *Hogue v. Johnson*, 131 F.3d 466, 501 (5th Cir. 1997) (referring to drugs and alcohol as "mind-altering substance[s]"), *cert. denied*, 523 U.S. 1014 (1998). In addition, the phrase appears in a number of state statutes, and the context

in which it appears confirms this understanding of the phrase. *See, e.g.*, Cal. Penal Code § 3500(c) (West Supp. 2000) ("Psychotropic drugs also include mind-altering . . . drugs . . . ."); Minn. Stat. Ann. § 260B.201(b) (West Supp. 2002) ("'chemical dependency treatment'" define as programs designed to "reduc[e] the risk of the use of alcohol, drugs, or other mind-altering substances").

This subparagraph, however, does not preclude any and all use of drugs. Instead, it prohibits the use of drugs that "disrupt profoundly the senses or the personality." To be sure, one could argue that this phrase applies only to "other procedures," not the application of mind-altering substances. We reject this interpretation because the terms of Section 2340(2) expressly indicate that the qualifying phrase applies to both "other procedures" *and* the "application of mind-altering substances." The word "other" modifies "procedures calculated to disrupt profoundly the senses." As an adjective, "other" indicates that the term or phrase it modifies is the remainder of several things. *See* Webster's Third New International Dictionary 1598 (1986) (defining "other" as "the one that remains of two or more") Webster's Ninth New Collegiate Dictionary 835 (1985) (defining "other" as "being the one (as of two or more) remaining or not included"). Or put another way, "other" signals that the words to which it attaches are of the same kind, type, or class as the more specific item previously listed. Moreover, where statutes couple words or phrases together, it "denotes an intention that they should be understood in the same general sense." Norman Singer, 2A Sutherland on Statutory Construction § 47:16 (6th ed. 2000); *see also Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). Thus, the pairing of mind-altering substances with procedures calculated to disrupt profoundly the senses or personality and the use of "other" to modify "procedures" shows that the use of such substances must also cause a profound disruption of the senses or personality.

For drugs or procedures to rise to the level of "disrupt[ing] profoundly the senses or personality," they must produce an extreme effect. And by requiring that they be "calculated" to produce such an effect, the statute requires for liability the defendant has consciously designed the acts to produce such an effect.28 U.S.C. § 2340(2)(B). The word "disrupt" is defined as "to break asunder; to part forcibly; rend," imbuing the verb with a connotation of violence. Webster's New International Dictionary 753 (2d ed. 1935); *see* Webster's Third New International Dictionary 656 (1986) (defining disrupt as "to break apart: Rupture" or "destroy the unity or wholeness of"); IV The Oxford English Dictionary 832 (1989) (defining disrupt as "[t]o break or burst asunder; to break in pieces; to separate forcibly"). Moreover, disruption of the senses or personality alone is insufficient to fall within the scope of this subsection; instead, that disruption must be profound. The word "profound" has a number of meanings, all of which convey a significant depth. Webster's New International Dictionary 1977 (2d ed. 1935) defines profound as: "Of very great depth; extending far below the surface or top; unfathomable[;] . . . [c]oming from, reaching to, or situated at a depth or more than ordinary depth; not superficial; deep-seated; chiefly with reference to the body; as a *profound* sigh, wound, or pain[;] . . . [c]haracterized by intensity, as of feeling or quality; deeply felt or realized; as, *profound* respect, fear, or melancholy; hence, encompassing;

thoroughgoing; complete; as, *profound* sleep, silence, or ignorance." *See* Webster's Third New International Dictionary 1812 (1986) ("having very great depth: extending far below the surface . . . not superficial"). Random House Webster's Unabridged Dictionary 1545 (2d ed. 1999) also defines profound as "originating in or penetrating to the depths of one's being" or "pervasive or intense; thorough; complete" or "extending, situated, or originating far down, or far beneath the surface." By requiring that the procedures and the drugs create a *profound* disruption, the statute requires more than that the acts "forcibly separate" or "rend" the senses or personality. Those acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality.

The phrase "disrupt profoundly the senses or personality" is not used in mental health literature nor is it derived from elsewhere in U.S. law. Nonetheless, we think the following examples would constitute a profound disruption of the senses or personality. Such an effect might be seen in a drug-induced dementia. In such a state, the individual suffers from significant memory impairment, such as the inability to retain any new information or recall information about things previously of interest to the individual. *See* DSM-IV at 134.[5] This impairment is accompanied by one or more of the following: deterioration of language function, e.g., repeating sounds or words over and over again; impaired ability to execute simple motor activities, e.g., inability to dress or wave goodbye; "[in]ability to recognize [and identify] objects such as chairs or pencils" despite normal visual functioning; or "[d]isturbances in executive level functioning," i.e., serious impairment of abstract thinking. *Id.* at 134–35. Similarly, we think that the onset of "brief psychotic disorder" would satisfy this standard. *See id.* at 302–03. In this disorder, the individual suffers psychotic symptoms, including among other things, delusions, hallucinations, or even a catatonic state. This can last for one day or even one month. *See id.* We likewise think that the onset of obsessive-compulsive disorder behaviors would rise to this level. Obsessions are intrusive thoughts unrelated to reality. They are not simple worries, but are repeated doubts or even "aggressive or horrific impulses." *See id.* at 418. The DSM-IV further explains that compulsions include "repetitive behaviors (e.g., hand washing, ordering, checking)" and that "[b]y definition, [they] are either clearly excessive or are not connected in a realistic way with what they are designed to neutralize or prevent." *See id.* Such compulsions or obsessions must be "time-consuming." *See id.* at 419. Moreover, we think that pushing someone to the brink of suicide, particularly where the person comes from a culture with strong taboos against suicide, and it is evidenced by acts of self-mutilation, would be a sufficient disruption of the personality to constitute a "profound disruption." These examples, of course, are in no way intended to be exhaustive list. Instead, they are merely intended to

[5] Published by the American Psychiatric Association, and written as a collaboration of over a thousand psychiatrists, the DSM-IV is commonly used in U.S. courts as a source of information regarding mental health issues and is likely to be used in trial should charges be brought that allege this predicate act. *See, e.g., Atkins v. Virginia*, 122 S. Ct. 2242, 2245 n.3 (2002); *Kansas v. Crane*, 122 S. Ct. 867, 871 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 359–60 (1997); *McClean v. Merrifield*, No. 00-CV-0120E(SC), 2002 WL 1477607 at *2 n.7 (W.D.N.Y. June 28, 2002); *Peeples v. Coastal Office Prods.*, 203 F. Supp. 2d. 432, 439 (D. Md. 2002); *Lassiegne v. Taco Bell Corp.*, 202 F. Supp. 2d 512, 519 (E.D. La. 2002).

illustrate the sort of mental health effects that we believe would accompany an action severe enough to amount to one that "disrupt[s] profoundly the senses or the personality."

The third predicate act listed in Section 2340(2) is threatening a prisoner with "imminent death." 18 U.S.C. § 2340(2)(C). The plain text makes clear that a threat of death alone is insufficient; the threat must indicate that death is "imminent." The "threat of imminent death" is found in the common law as an element of the defense of duress. *See Bailey*, 444 U.S. at 409. "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Common law cases and legislation generally define imminence as requiring that the threat be almost immediately forthcoming. 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.7, at 655 (1986). By contrast, threats referring vaguely to things that might happen in the future do not satisfy this immediacy requirement. *See United States v. Fiore*, 178 F.3d 917, 923 (7th Cir. 1999). Such a threat fails to satisfy this requirement not because it is too remote in time but because there is a lack of certainty that it will occur. Indeed, timing is an indicator of certainty that the harm *will* befall the defendant. Thus, a vague threat that someday the prisoner *might* be killed would not suffice. Instead, subjecting a prisoner to mock executions or playing Russian roulette with him would have sufficient immediacy to constitute a threat of imminent death. Additionally, as discussed earlier, we believe that the existence of a threat must be assessed from the perspective of a reasonable person in the same circumstances.

Fourth, if the official threatens to do anything previously described to a third party, or commits such an act against a third party, that threat or action can serve as the necessary predicate for prolonged mental harm. *See* 18 U.S.C. § 2340(2)(D). The statute does not require any relationship between the prisoner and the third party.

*3. Legislative History*

The legislative history of Sections 2340–2340A is scant. Neither the definition of torture nor these sections as a whole sparked any debate. Congress criminalized this conduct to fulfill U.S. obligations under the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987), which requires signatories to "ensure that all acts of torture are offenses under its criminal law." CAT art. 4. These sections appeared only in the Senate version of the Foreign Affairs Authorization Act, and the conference bill adopted them without amendment. *See* H. R. Conf. Rep. No. 103-482, at 229 (1994). The only light that the legislative history sheds reinforces what is already obvious from the texts of Section 2340 and CAT: Congress intended Section 2340's definition of torture to track the definition set forth in CAT, as elucidated by the United States' reservations, understandings, and declarations

submitted as part of its ratification. *See* S. Rep. No. 103-107, at 58 (1993) ("The definition of torture emanates directly from article 1 of the Convention."); *id.* at 58–59 ("The definition for 'severe mental pain and suffering' incorporates the understanding made by the Senate concerning this term.").

*4. Summary*

Section 2340's definition of torture must be read as a sum of these component parts. *See Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434–35 (1989) (reading two provisions together to determine statute's meaning); *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 405 (1988) (looking to "the language and design of the statute as a whole" to ascertain a statute's meaning). Each component of the definition emphasizes that torture is not the mere infliction of pain or suffering on another, but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm. Indeed, this view of the criminal act of torture is consistent with the term's common meaning. Torture is generally understood to involve "intense pain" or "excruciating pain," or put another way, "extreme anguish of body or mind." Black's Law Dictionary at 1498 (7th Ed. 1999); Random House Webster's Unabridged Dictionary 1999 (1999); Webster's New International Dictionary 2674 (2d ed. 1935). In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts.[6]

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[6] Torture is a term also found in state law. Some states expressly proscribe "murder by torture." *See, e.g.*, Idaho Code § 18-4001 (Michie 1997); N.C. Gen. Stat. Ann. § 14-17 (1999) ; *see also* Me. Rev. Stat. Ann. tit. 17-A, § 152-A (West Supp. 2001) (aggravated attempted murder is "[t]he attempted murder . . . accompanied by torture, sexual assault or other extreme cruelty inflicted upon the victim"). Other states have made torture an aggravating factor supporting imposition of the death penalty. *See, e.g.*, Ark. Code Ann. § 5-4-604(8)(B); Del. Code Ann. tit. 11, § 4209(e)(1)(*l*) (1995); Ga. Code Ann. § 17-10-30(b)(7) (1997); ; 720 Ill. Comp. Stat. Ann. 5/9-1(b)(14) (West Supp. 2002); Mass. Ann. Laws ch. 279, § 69(a) (Law. Co-op. 1992); Mo. Ann. Stat. § 565.032(2)(7) (West 1999); Nev. Rev. Stat. Ann. 200-033(8) (Michie 2001); N.J. Stat. Ann. § 2C:11-3 (West Supp. 2002) (same); Tenn. Code Ann. § 39-13-204(i)(5) (Supp. 2001); *see also* Alaska Stat. § 12.55.125(a)(3) (2000) (term of 99 years' imprisonment mandatory where defendant subjected victim to "substantial physical torture"). *All of these laws support the conclusion that torture is generally an extreme act far beyond the infliction of pain or suffering alone.*

California law is illustrative on this point. The California Penal Code not only makes torture itself an offense, see Cal. Penal Code § 206 (West Supp. 2002), it also prohibits murder by torture, see Cal. Penal Code § 189 (West Supp. 2002), and provides that torture is an aggravating circumstance supporting the imposition of the death penalty, see Cal. Penal Code § 190.2 (West Supp. 2002). California's definitions of torture demonstrate that the term is reserved for especially cruel acts inflicting serious injury. Designed to "fill[] a gap in existing law dealing with extremely violent and callous criminal conduct[,]" *People v. Hale*, 88 Cal. Rptr. 2d 904, 913 (1999) (internal quotation marks and citation omitted), Section 206 defines the offense of torture as:

> [e]very person who, with the intent to cause *cruel* or *extreme* pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily

## II. U.N. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

Because Congress enacted the criminal prohibition against torture to implement CAT, we also examine the treaty's text and history to develop a fuller understanding of the context of Sections 2340–2340A. As with the statute, we begin our analysis with the treaty's text. *See Eastern Airlines Inc. v. Floyd*, 499 U.S. 530, 534–35 (1991) ("When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used.) (quotation marks and citations omitted). CAT defines torture as:

> any act by which *severe* pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Article 1(1) (emphasis added). Unlike Section 2340, this definition includes a list of purposes for which such pain and suffering is inflicted. The prefatory phrase "such purposes as" makes clear that this list is, however, illustrative rather than exhaustive. Accordingly, severe pain or suffering need not be inflicted for those specific purposes to constitute torture; instead, the perpetrator must simply have a purpose of the same kind.

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> injury . . . upon the person of another, is guilty of torture. The crime of torture does not require any proof that the victim suffered pain.

(Emphasis added). With respect to sections 190.2 and 189, neither of which are statutorily defined, California courts have recognized that torture generally means an "[a]ct or process of inflicting severe pain, esp[ecially] as a punishment to extort confession, or in revenge. . . . Implicit in that definition is the requirement of an intent to cause pain and suffering in addition to death." *People v. Barrera*, 18 Cal. Rptr. 2d 395, 399 (Ct. App. 1993) (quotation marks and citation omitted). Further, "'murder by torture was and is considered among the most reprehensible types of murder because of the calculated nature of the acts causing death.'" *Id.* at 403 (quoting *People v. Wiley*, 133 Cal. Rptr. 135, 138 (1976) (in bank)). The definition of murder by torture special circumstance, proscribed under Cal. Penal Code § 190.2, likewise shows an attempt to reach the most heinous acts imposing pain beyond that which a victim suffers through death alone. To establish murder by torture special circumstance, the "intent to kill, intent to torture, and infliction of an extremely painful act upon a living victim" must be present. *People v. Bemore*, 94 Cal. Rptr. 2d 840, 861 (2000). The intent to torture is characterized by a "'sadistic intent to cause the victim to suffer pain in addition to the pain of death.'" *Id.* at 862 (quoting *People v. Davenport*, 221 Cal. Rptr. 794, 875 (1985)). Like the Torture Victims Protection Act and the Convention Against Torture, discussed *infra* at Parts II and III, each of these California prohibitions against torture require an evil intent—such as cruelty, revenge or even sadism. Section 2340 does not require this additional intent, but as discussed *supra* pp. 2–3, requires that the individual specifically intended to cause severe pain or suffering. Furthermore, unlike Section 2340, neither section 189 nor section 206 appear to require proof of actual pain to establish torture.

More importantly, like Section 2340, the pain and suffering must be severe to reach the threshold of torture. Thus, the text of CAT reinforces our reading of Section 2340 that torture must be an extreme act.[7]

CAT also distinguishes between torture and other acts of cruel, inhuman, or degrading treatment or punishment.[8] Article 16 of CAT requires state parties to "undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* as defined in article 1." (Emphasis added). CAT thus establishes a category of acts that are not to be committed and that states must endeavor to prevent, but that states need not criminalize, leaving those acts without the stigma of criminal penalties. CAT reserves criminal penalties and the stigma attached to those penalties for torture alone. In so doing, CAT makes clear that torture is at the farthest end of impermissible actions, and that it is distinct and separate from the lower level of "cruel, inhuman, or degrading treatment or punishment." This approach is in keeping with CAT's predecessor, the U.N. Declaration on the Protection from Torture. That declaration defines torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on Protection from Torture, UN Res. 3452, Art. 1(2) (Dec. 9, 1975).

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[7] To be sure, the text of the treaty requires that an individual act "intentionally." This language might be read to require only general intent for violations of the Torture Convention. We believe, however, that the better interpretation is that that the use of the phrase "intentionally" also created a specific intent-type standard. In that event, the Bush administration's understanding represents only an explanation of how the United States intended to implement the vague language of the Torture Convention. If, however, the Convention established a general intent standard, then the Bush understanding represents a modification of the obligation undertaken by the United States.

[8] Common article 3 of Geneva Convention on prisoners of war, Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3517 ("Geneva Convention III") contains somewhat similar language. Article 3(1)(a) prohibits "violence to life and person, in particular murder of all kinds, mutilation, *cruel treatment and torture*." (Emphasis added). Article 3(1)(c) additionally prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment." Subsection (c) must forbid more conduct than that already covered in subsection (a) otherwise subsection (c) would be superfluous. Common article 3 does not, however, define either of the phrases "outrages upon personal dignity" or "humiliating and degrading treatment." International criminal tribunals, such as those respecting Rwanda and former Yugoslavia have used common article 3 to try individuals for committing inhuman acts lacking any military necessity whatsoever. Based on our review of the case law, however, these tribunals have not yet articulated the full scope of conduct prohibited by common article 3. Memorandum for John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, from James C. Ho, Attorney-Advisor, Office of Legal Counsel, *Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War* (Feb. 1, 2002).

We note that Section 2340A and CAT protect any individual from torture. By contrast, the standards of conduct established by common article 3 of Convention III, do not apply to "an armed conflict between a nation-state and a transnational terrorist organization." Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 8 (Jan. 22, 2002).

## A. Ratification History

Executive branch interpretation of CAT further supports our conclusion that the treaty, and thus Section 2340A, prohibits only the most extreme forms of physical or mental harm. As we have previously noted, the "division of treaty-making responsibility between the Senate and the President is essentially the reverse of the division of law-making authority, with the President being the draftsman of the treaty and the Senate holding the authority to grant or deny approval." *Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 31 (Apr. 9, 1987) ("Sofaer Memorandum"). Treaties are negotiated by the President in his capacity as the "sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Moreover, the President is responsible for the day-to-day interpretation of a treaty and retains the power to unilaterally terminate a treaty. *See Goldwater v. Carter*, 617 F.2d 697, 707–08 (D.C. Cir.) (en banc) *vacated and remanded with instructions to dismiss on other grounds*, 444 U.S. 996 (1979). The Executive's interpretation is to be accorded the greatest weight in ascertaining a treaty's intent and meaning. *See, e.g., United States v. Stuart*, 489 U.S. 353, 369 (1989) ("'the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight'") (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the department of government particularly charged with their negotiation and enforcement is given great weight."); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913) ("A construction of a treaty by the political departments of the government, while not conclusive upon a court . . . , is nevertheless of much weight.").

A review of the Executive branch's interpretation and understanding of CAT reveals that Congress codified the view that torture included only the most extreme forms of physical or mental harm. When it submitted the Convention to the Senate, the Reagan administration took the position that CAT reached only the most heinous acts. The Reagan administration included the following understanding:

> The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.

S. Treaty Doc. No. 100-20, at 4–5. Focusing on the treaty's requirement of "severity," the Reagan administration concluded, "The extreme nature of torture is further emphasized in [this] requirement." S. Treaty Doc. No. 100-20, at 3 (1988); S. Exec. Rep. 101-30, at 13 (1990). The Reagan administration also determined that CAT's definition of torture fell in line with "United States and international usage, [where it] is usually reserved for extreme deliberate and unusually cruel practices, for example, sustained systematic beatings, application of electric currents to sensitive parts of the body and tying up or hanging in positions that cause extreme pain." S. Exec. Rep. No. 101-30, at

14 (1990). In interpreting CAT's definition of torture as reaching only such extreme acts, the Reagan administration underscored the distinction between torture and other cruel, inhuman, or degrading treatment or punishment. In particular, the administration declared that article 1's definition of torture ought to be construed in light of article 16. *See* S. Treaty Doc. No. 100-20, at 3. Based on this distinction, the administration concluded that: "'Torture' is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in case of torture." S. Treaty Doc. 100-20, at 3. Moreover, this distinction was "adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment." S. Treaty Doc. No. 100-20, at 3. Given the extreme nature of torture, the administration concluded that "rough treatment as generally falls into the category of 'police brutality,' while deplorable, does not amount to 'torture.'" S. Treaty Doc. No. 100-20, at 4.

Although the Reagan administration relied on CAT's distinction between torture and "cruel, inhuman, or degrading treatment or punishment," it viewed the phrase "cruel, inhuman, or degrading treatment or punishment" as vague and lacking in a universally accepted meaning. Of even greater concern to the Reagan administration was that because of its vagueness this phrase could be construed to bar acts not prohibited by the U.S. Constitution. The administration pointed to *Case of X v. Federal Republic of Germany* as the basis for this concern. In that case, the European Court of Human Rights determined that the prison officials' refusal to recognize a prisoner's sex change might constitute degrading treatment. *See* S. Treaty Doc. No. 100-20, at 15 (citing European Commission on Human Rights, *Dec. on Adm.*, Dec. 15, 1977, *Case of X v. Federal Republic of Germany* (No. 6694/74), 11 Dec. & Rep. 16)). As a result of this concern, the Administration added the following understanding:

> The United States understands the term, 'cruel, inhuman or degrading treatment or punishment,' as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."

S. Treaty Doc. No. 100-20, at 15–16. Treatment or punishment must therefore rise to the level of action that U.S. courts have found to be in violation of the U.S. Constitution in order to constitute cruel, inhuman, or degrading treatment or punishment. That which fails to rise to this level must fail, *a fortiori*, to constitute torture under Section 2340.[9]

[9] The vagueness of "cruel, inhuman and degrading treatment" enables the term to have a far-ranging reach. Article 3 of the European Convention on Human Rights similarly prohibits such treatment. The European Court of Human Rights has construed this phrase broadly, even assessing whether such treatment has occurred from the subjective stand point of the victim. *See* Memorandum from James C. Ho, Attorney-Advisor to John C. Yoo, Deputy Assistant Attorney General, *Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War* (Feb. 1, 2002) (finding that European Court of Human Right's construction of inhuman or degrading treatment "is broad enough to arguably forbid even standard U.S. law enforcement interrogation techniques, which endeavor to break down a detainee's 'moral resistance' to answering questions.").

The Senate did not give its advice and consent to the Convention until the first Bush administration. Although using less vigorous rhetoric, the Bush administration joined the Reagan administration in interpreting torture as only reaching extreme acts. To ensure that the Convention's reach remained limited, the Bush administration submitted the following understanding:

> The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental pain caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

S. Exec. Rep. No. 101-30, at 36. This understanding accomplished two things. First, it ensured that the term "intentionally" would be understood as requiring specific intent. Second, it added form and substance to the otherwise amorphous concept of *mental* pain or suffering. In so doing, this understanding ensured that mental torture would rise to a severity seen in the context of physical torture. The Senate ratified CAT with this understanding, and as is obvious from the text, Congress codified this understanding almost verbatim in the criminal statute.

To be sure, it might be thought significant that the Bush administration's language differs from the Reagan administration understanding. The Bush administration said that it had altered the CAT understanding in response to criticism that the Reagan administration's original formulation had raised the bar for the level of pain necessary for the act or acts to constitute torture. *See* Convention Against Torture: Hearing Before the Senate Comm. On Foreign Relations, 101st Cong. 9–10 (1990) ("1990 Hearing") (prepared statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State). While it is true that there are rhetorical differences between the understandings, both administrations consistently emphasize the extraordinary or extreme acts required to constitute torture. As we have seen, the Bush understanding as codified in Section 2340 reaches only extreme acts. The Reagan understanding, like the Bush understanding, ensured that "intentionally" would be understood as a specific intent requirement.

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Moreover, despite the Reagan and Bush administrations' efforts to limit the reach of the cruel, inhuman and degrading treatment language, it appears to still have a rather limitless reach. *See id.* (describing how the Eighth Amendment ban on "cruel and unusual punishment" has been used by courts to, *inter alia*, "engage in detailed regulation of prison conductions, including the exact size cells, exercise, and recreational activities, quality of food, access to cable television, internet, and law libraries.")

Though the Reagan administration required that the "act be deliberate and calculated" *and* that it be inflicted with specific intent, in operation there is little difference between requiring specific intent alone and requiring that the act be deliberate and calculated. The Reagan understanding's also made express what is obvious from the plain text of CAT: torture is an extreme form of cruel and inhuman treatment. The Reagan administration's understanding that the pain be "excruciating and agonizing" is in substance not different from the Bush administration's proposal that the pain must be severe.

The Bush understanding simply took a rather abstract concept—excruciating and agonizing mental pain—and gave it a more concrete form. Executive branch representations made to the Senate support our view that there was little difference between these two understandings and that the further definition of mental pain or suffering merely sought remove the vagueness created by concept of "agonizing and excruciating" mental pain. *See* 1990 Hearing, at 10 (prepared statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State) ("no higher standard was intended" by the Reagan administration understanding than was present in the Convention or the Bush understanding); *id.* at 13–14 (statement of Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice) ("In an effort to overcome this unacceptable element of vagueness [in the term "mental pain"], we have proposed an understanding which defines severe mental pain constituting torture with sufficient specificity . . . to protect innocent persons and meet constitutional due process requirements.") Accordingly, we believe that the two definitions submitted by the Reagan and Bush administrations had the same purpose in terms of articulating a legal standard, namely, ensuring that the prohibition against torture reaches only the most extreme acts. Ultimately, whether the Reagan standard would have been even higher is a purely academic question because the Bush understanding clearly established a very high standard.

Executive branch representations made to the Senate confirm that the Bush administration maintained the view that torture encompassed only the most extreme acts. Although the ratification record, i.e., testimony, hearings, and the like, is generally not accorded great weight in interpreting treaties, authoritative statements made by representatives of the Executive Branch are accorded the most interpretive value. *See* Sofaer Memorandum, at 35–36. Hence, the testimony of the executive branch witnesses defining torture, in addition to the reservations, understandings and declarations that were submitted to the Senate by the Executive branch, should carry the highest interpretive value of any of the statements in the ratification record. At the Senate hearing on CAT, Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice, offered extensive testimony as to the meaning of torture. Echoing the analysis submitted by the Reagan administration, he testified that "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct." 1990 Hearing, at 16 (prepared statement of Mark Richard). He further explained, "As applied to physical torture, there appears to be some degree of consensus that the concept involves conduct, the mere mention of which sends chills down one's spine[.]" *Id.* Richard gave the following examples of conduct satisfying this standard: "the needle under the fingernail, the application of electrical shock to the genital area, the piercing of

eyeballs, etc." *Id.* In short, repeating virtually verbatim the terms used in the Reagan understanding, Richard explained that under the Bush administration's submissions with the treaty "the essence of torture" is treatment that inflicts " "excruciating and agonizing physical pain." *Id.* (emphasis added).

As to mental torture, Richard testified that "no international consensus had emerged [as to] what degree of mental suffering is required to constitute torture[,]" but that it was nonetheless clear that severe mental pain or suffering "does not encompass the normal legal compulsions which are properly a part of the criminal justice system[:] interrogation, incarceration, prosecution, compelled testimony against a friend, etc,—notwithstanding the fact that they may have the incidental effect of producing mental strain." *Id.* at 17. According to Richard, CAT was intended to "condemn as torture intentional acts such as those designed to damage and destroy the human personality." *Id.* at 14. This description of mental suffering emphasizes the requirement that any mental harm be of significant duration and lends further support for our conclusion that mind-altering substances must have a profoundly disruptive effect to serve as a predicate act.

Apart from statements from Executive branch officials, the rest of a ratification record is of little weight in interpreting a treaty. *See generally* Sofaer Memorandum. Nonetheless, the Senate understanding of the definition of torture largely echoes the administrations' views. The Senate Foreign Relations Committee Report on CAT opined: "[f]or an act to be 'torture' it must be an *extreme* form of cruel and inhuman treatment, cause *severe* pain and suffering and be *intended to cause severe* pain and suffering." S. Exec. Rep. No. 101-30, at 6 (emphasis added). Moreover, like both the Reagan and Bush administrations, the Senate drew upon the distinction between torture and cruel, inhuman or degrading treatment or punishment in reaching its view that torture was extreme.[10] Finally, the Senate concurred with the administrations' concern that "cruel, inhuman, or degrading treatment or punishment" could be construed to establish a new standard above and beyond that which the Constitution mandates and supported the inclusion of the reservation establishing the Constitution as the baseline for determining whether conduct amounted to cruel, inhuman, degrading treatment or punishment. *See* 136 Cong. Rec. 36,192 (1990); S. Exec. Rep. 101-30, at 39.

## B. Negotiating History

CAT's negotiating history also indicates that its definition of torture supports our reading of Section 2340. The state parties endeavored to craft a definition of torture that reflected the term's gravity. During the negotiations, state parties offered various formulations of the definition of torture to the working group, which then proposed a

[10] Hearing testimony, though the least weighty evidence of meaning of all of the ratification record, is not to the contrary. Other examples of torture mentioned in testimony similarly reflect acts resulting in intense pain: the "gouging out of childrens' [sic] eyes, the torture death by molten rubber, the use of electric shocks," cigarette burns, hanging by hands or feet. 1990 Hearing at 45 (Statement of Winston Nagan, Chairman, Board of Directors, Amnesty International USA); *id.* at 79 (Statement of David Weissbrodt, Professor of Law, University of Minnesota, on behalf of the Center for Victims of Torture, the Minnesota Lawyers International Human Rights Committee).

definition based on those formulations. Almost all of these suggested definitions illustrate the consensus that torture is an extreme act designed to cause agonizing pain. For example, the United States proposed that torture be defined as "includ[ing] any act by which extremely severe pain or suffering . . . is deliberately and maliciously inflicted on a person." J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment* 41 (1988) ("CAT Handbook"). The United Kingdom suggested an even more restrictive definition, i.e., that torture be defined as the "*systematic and intentional* infliction of *extreme* pain or suffering rather than *intentional* infliction of *severe* pain or suffering." *Id.* at 45 (emphasis in original). Ultimately, in choosing the phrase "severe pain," the parties concluded that this phrase "sufficient[ly] . . . convey[ed] the idea that only acts of a certain gravity shall . . . constitute torture." *Id.* at 117.

In crafting such a definition, the state parties also were acutely aware of the distinction they drew between torture and cruel, inhuman, or degrading treatment or punishment. The state parties considered and rejected a proposal that would have defined torture merely as cruel, inhuman or degrading treatment or punishment. *See id.* at 42. Mirroring the Declaration on Protection From Torture, which expressly defined torture as an "aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment," some state parties proposed that in addition to the definition of torture set out in paragraph 2 of article 1, a paragraph defining torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment" should be included. *See id.* at 41; *see also* S. Treaty Doc. No. 100-20, at 2 (the U.N. Declaration on Protection from Torture (1975) served as "a point of departure for the drafting of [CAT]"). In the end, the parties concluded that the addition of such a paragraph was superfluous because Article 16 "impl[ies] that torture is the gravest form of such treatment or punishment." *CAT Handbook* at 80; *see* S. Exec. Rep. No. 101-30, at 13 ("The negotiating history indicates that [the phrase 'which do not amount to torture'] was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.").

Additionally, the parties could not reach a consensus about the meaning of "cruel, inhuman, or degrading treatment or punishment." *See CAT Handbook* at 47. Without a consensus, the parties viewed the term as simply "'too vague to be included in a convention which was to form the basis for criminal legislation in the Contracting States.'" *Id.* This view evinced by the parties reaffirms the interpretation of CAT as purposely reserving criminal penalties for torture alone.

CAT's negotiating history offers more than just support for the view that pain or suffering must be extreme to amount to torture. First, the negotiating history suggests that the harm sustained from the acts of torture need not be permanent. In fact, "the United States considered that it might be useful to develop the negotiating history which indicates that although conduct resulting in permanent impairment of physical or mental faculties is indicative of torture, it is not an essential element of the offence." *Id.* at 44.

Second, the state parties to CAT rejected a proposal to include in CAT's definition of torture the use of truth drugs, where no physical harm or mental suffering was apparent. This rejection at least suggests that such drugs were not viewed as amounting to torture per se. *See id.* at 42.

### C. Summary

The text of CAT confirms our conclusion that Section 2340A was intended to proscribe only the most egregious conduct. CAT not only defines torture as involving severe pain and suffering, but also it makes clear that such pain and suffering is at the extreme end of the spectrum of acts by reserving criminal penalties solely for torture. Executive interpretations confirm our view that the treaty (and hence the statute) prohibits only the worst forms of cruel, inhuman, or degrading treatment or punishment. The ratification history further substantiates this interpretation. Even the negotiating history displays a recognition that torture is a step far-removed from other cruel, inhuman or degrading treatment or punishment. In sum, CAT's text, ratification history and negotiating history all confirm that Section 2340A reaches only the most heinous acts.

## III. U.S. Judicial Interpretation

There are no reported cases of prosecutions under Section 2340A. *See* Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 Hastings Int'l & Comp. L. Rev. 401, 408 & n.29 (2001); Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l L. J. 141, 148–49 (2001); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 327–28. Nonetheless, we are not without guidance as to how United States courts would approach the question of what conduct constitutes torture. Civil suits filed under the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000), which supplies a tort remedy for victims of torture, provide insight into what acts U.S. courts would conclude constitute torture under the criminal statute.

The TVPA contains a definition similar in some key respects to the one set forth in Section 2340. Moreover, as with Section 2340, Congress intended for the TVPA's definition of torture to follow closely the definition found in CAT. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 176 n.12 (D. Mass 1995) (noting that the definition of torture in the TVPA tracks the definitions in Section 2340 and CAT).[11] The TVPA defines torture as:

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[11] *See also* 137 Cong. Rec. 34,785 (statement of Rep. Mazzoli) ("Torture is defined in accordance with the definition contained in [CAT]"); *see also* Torture Victims Portection Act: Hearing and Markup on H.R. 1417 Before the Subcomm. On Human Rights and International Organizations of the House Comm. on Foreign Affairs, 100th Cong. 38 (1988) (Prepared Statement of the Association of the Bar of the City of New York, Committee on International Human Rights) ("This language essentially tracks the definition of 'torture' adopted in the Torture Convention.").

> (1). . . any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from–
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 1350 note § 3(b). This definition differs from Section 2340's definition in two respects. First, the TVPA definition contains an illustrative list of purposes for which such pain may have been inflicted. *See id.* Second, the TVPA includes the phrase "arising only from or inherent in, or incidental to lawful sanctions"; by contrast, Section 2340 refers only to pain or suffering "incidental to lawful sanctions." *Id.* Because the purpose of our analysis here is to ascertain acts that would cross the threshold of producing "severe physical or mental pain or suffering," the list of illustrative purposes for which it is inflicted, generally would not affect this analysis.[12] Similarly, to the extent that the absence of the phrase "arising only from or inherent in" from Section 2340 might affect the question of whether pain or suffering was part of lawful sanctions and thus not torture, the circumstances with which we are concerned here are solely that of interrogations, not the imposition of punishment subsequent to judgment. These differences between the TVPA and Section 2340 are therefore not sufficiently significant to undermine the usefulness of TVPA cases here.[13]

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[12] This list of purposes is illustrative only. Nevertheless, demonstrating that a defendant harbored any of these purposes "may prove valuable in assisting in the establishment of intent at trial." Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. Int'l & Comp. L. Rev. 275, 314 (1994).

[13] The TVPA also requires that an individual act "intentionally." As we noted with respect to the text of CAT, see *supra* n. 7, this language might be construed as requiring general intent. It is not clear that this is so. We need not resolve that question, however, because we review the TVPA cases solely to address the acts that would satisfy the thresbold of inflicting "severe physical or mental pain or suffering."

In suits brought under the TVPA, courts have not engaged in any lengthy analysis of what acts constitute torture. In part, this is due to the nature of the acts alleged. Almost all of the cases involve physical torture, some of which is of an especially cruel and even sadistic nature. Nonetheless, courts appear to look at the entire course of conduct rather than any one act, making it somewhat akin to a totality-of-the-circumstances analysis. Because of this approach, it is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture. Certain acts do, however, consistently reappear in these cases or are of such a barbaric nature, that it is likely a court would find that allegations of such treatment would constitute torture: (1) severe beatings using instruments such as iron barks, truncheons, and clubs; (2) threats of imminent death, such as mock executions; (3) threats of removing extremities; (4) burning, especially burning with cigarettes; (5) electric shocks to genitalia or threats to do so; (6) rape or sexual assault, or injury to an individual's sexual organs, or threatening to do any of these sorts of acts; and (7) forcing the prisoner to watch the torture of others. Given the highly contextual nature of whether a set of acts constitutes torture, we have set forth in the attached appendix the circumstances in which courts have determined that the plaintiff has suffered torture, which include the cases from which these seven acts are drawn. While we cannot say with certainty that acts falling short of these seven would *not* constitute torture under Section 2340, we believe that interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate the law.

Despite the limited analysis engaged in by courts, a recent district court opinion provides some assistance in predicting how future courts might address this issue. In *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, (N.D. Ga. 2002), the plaintiffs, Bosnian Muslims, sued a Bosnian Serb, Nikola Vuckovic, for, among other things, torture and cruel and inhumane treatment. The court described in vivid detail the treatment the plaintiffs endured. Specifically, the plaintiffs experienced the following:

Vuckovic repeatedly beat Kemal Mehinovic with a variety of blunt objects and boots, intentionally delivering blows to areas he knew to already be badly injured, including Mehinovic's genitals. *Id.* at 1333–34. On some occasions he was tied up and hung against windows during beatings. *Id.* Mehinovic, was subjected to the game of "Russian roulette" *See id.* Vuckovic, along with other guards, also forced Mehinovic to run in a circle while the guards swung wooden planks at him. *Id.*

Like Mehinovic, Muhamed Bicic was beaten repeatedly with blunt objects, to the point of loss of consciousness. *See Id* at 1335. He witnessed the severe beatings of other prisoners, including his own brother. "On one occasion, Vuckovic ordered Bicic to get on all fours while another soldier stood or rode on his back and beat him with a baton—a game the soldiers called 'horse.'" *Id.* Bicic, like Mehinovic, was subjected to the game of Russian roulette. Additionally, Vuckovic and the other guards forcibly extracted a number of Bicic's teeth. *Id.* at 1336.

Safet Hadzialijagic was subjected to daily beatings with "metal pipes, bats, sticks, and weapons." *Id.* at 1337.He was also subjected to Russian roulette *See id.* at 1336–37.

Hadzialijagic also frequently saw other prisoners being beaten or heard their screams as they were beaten. Like Bicic, he was subjected to the teeth extraction incident. On one occasion, Vuckovic rode Hadzialijagic like a horse, simultaneously hitting him in the head and body with a knife handle. During this time, other soldiers kicked and hit him. He fell down during this episode and was forced to get up and continue carrying Vuckovic. *See id.* "Vuckovic and the other soldiers [then] tied Hadzialijagic with a rope, hung him upside down, and beat him. When they noticed that Hadzialijagic was losing consciousness, they dunked his head in a bowl used as a toilet." *Id.* Vuckovic then forced Hadzialijagic to lick the blood off of Vuckovic's boots and kicked Hadzialijagic as he tried to do so. Vuckovic then used his knife to carve a semi-circle in Hadzialijagic's forehead. Hadzialijagic went into cardiac arrest just after this incident and was saved by one of the other plaintiffs. *See id.*

Hasan Subasic was brutally beaten and witnessed the beatings of other prisoners, including the beating and death of one of his fellow prisoners and the beating of Hadzialijagic in which he was tied upside down and beaten. *See id.* at 1338–39. *Id.* at 1338. Subasic also was subjected to the teeth pulling incident. Vuckovic personally beat Subasic two times, punching him and kicking him with his military boots. In one of these beatings, "Subasic had been forced into a kneeling position when Vuckovic kicked him in the stomach." *Id.*

The district court concluded that the plaintiffs suffered both physical and mental torture at the hands of Vuckovic.[14] With respect to physical torture, the court broadly outlined with respect to each plaintiff the acts in which Vuckovic had been at least complicit and that it found rose to the level of torture. Regarding Mehinovic, the court determined that Vuckovic's beatings of Mehinovic in which he kicked and delivered other blows to Mehinovic's face, genitals, and others body parts, constituted torture. The court noted that these beatings left Mehinovic disfigured, may have broken ribs, almost caused Mehinovic to lose consciousness, and rendered him unable to eat for a period of time. As to Bicic, the court found that Bicic had suffered severe physical pain and suffering as a result of Vuckovic's repeated beatings of him in which Vuckovic used various instruments to inflict blows, the "horse" game, and the teeth pulling incident. *See id.* at 1346. In finding that Vuckovic inflicted severe physical pain on Hadzialijagic, the court unsurprisingly focused on the beating in which Vuckovic tied Hadzialijagic upside down and beat him. *See id.* The court pointed out that in this incident, Vuckovic almost killed Hadzialijagic. *See id.* The court further concluded that Subasic experienced severe physical pain and thus was tortured based on the beating in which Vuckovic kicked Subasic in the stomach. *See id.*

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[14] The court also found that a number of acts perpetrated against the plaintiffs constituted cruel, inhuman, or degrading treatment but not torture. In its analysis, the court appeared to fold into cruel, inhuman, or degrading treatment two distinct categories. First, cruel, inhuman, or degrading treatment includes acts that "do not rise to the level of 'torture.'" *Id.* at 1348. Second, cruel, inhuman, or degrading treatment includes acts that "do not have the same purposes as 'torture.'" *Id.* By including this latter set of treatment as cruel, inhuman or degrading, the court appeared to take the view that acts that would otherwise constitute torture fall outside that definition because of the absence of the particular purposes listed in the TVPA and the treaty. Regardless of the relevance of this concept to the TVPA or CAT, the purposes listed in the TVPA are not an element of torture for purposes of sections 2340–2340A.

The court also found that the plaintiffs had suffered severe mental pain. In reaching this conclusion, the court relied on the plaintiffs' testimony that they feared they would be killed during beatings by Vuckovic or during the "game" of Russian roulette. Although the court did not specify the predicate acts that caused the prolonged mental harm, it is plain that both the threat of severe physical pain and the threat of imminent death were present and persistent. The court also found that the plaintiffs established the existence of prolonged mental harm as each plaintiff "*continues* to suffer long-term psychological harm as a result of [their] ordeals." *Id.* (emphasis added). In concluding that the plaintiffs had demonstrated the necessary "prolonged mental harm," the court's description of that harm as ongoing and "long-term" confirms that, to satisfy the prolonged mental harm requirement, the harm must be of a substantial duration.

The court did not, however, delve into the nature of psychological harm in reaching its conclusion. Nonetheless, the symptoms that the plaintiffs suffered and continue to suffer are worth noting as illustrative of what might in future cases be held to constitute mental harm. Mehinovic had "anxiety, flashbacks, and nightmares and has difficulty sleeping." *Id.* at 1334. Similarly, Bicic, "suffers from anxiety, sleeps very little, and has frequent nightmares" and experiences frustration at not being able to work due to the physical and mental pain he suffers. *Id.* at 1336. Hadzialijagic experienced nightmares, at times required medication to help him sleep, suffered from depression, and had become reclusive as a result of his ordeal. *See id.* at 1337–38. Subasic, like the others, had nightmares and flashbacks, but also suffered from nervousness, irritability, and experienced difficulty trusting people. The combined effect of these symptoms impaired Subasic's ability to work. *See id.* at 1340. Each of these plaintiffs suffered from mental harm that destroyed his ability to function normally, on a daily basis, and would continue to do so into the future.

In general, several guiding principles can be drawn from this case. First, this case illustrates that a single incident can constitute torture. The above recitation of the case's facts shows that Subasic was clearly subjected to torture in a number of instances, e.g., the teeth pulling incident, which the court finds to constitute torture in discussing Bicic. The court nevertheless found that the beating in which Vuckovic delivered a blow to Subasic's stomach while he was on his knees sufficed to establish that Subasic had been tortured. Indeed, the court stated that this incident "caus[ed] Subasic to suffer severe pain." *Id.* at 1346. The court's focus on this incident, despite the obvious context of a course of torturous conduct, suggests that a course of conduct is unnecessary to establish that an individual engaged in torture. It bears noting, however, that there are no decisions that have found an example of torture on facts that show the action was isolated, rather than part of a systematic course of conduct. Moreover, we believe that had this been an isolated instance, the court's conclusion that this act constituted torture would have been in error, because this single blow does not reach the requisite level of severity.

Second, the case demonstrates that courts may be willing to find that a wide range of physical pain can rise to the necessary level of "severe pain or suffering." At one end of the spectrum is what the court calls the "nightmarish beating" in which Vuckovic hung

Hadzialijagic upside down and beat him, culminating in Hadzialijagic going into cardiac arrest and narrowly escaping death. *Id.* It takes little analysis or insight to conclude that this incident constitutes torture. At the other end of the spectrum, is the court's determination that a beating in which "Vuckovic hit plaintiff Subasic and kicked him in the stomach with his military boots while Subasic was forced into a kneeling position[]" constituted torture. *Id.* To be sure, this beating caused Subasic substantial pain. But that pain pales in comparison to the other acts described in this case. Again, to the extent the opinion can be read to endorse the view that this single act and the attendant pain, considered in isolation, rose to the level of "severe pain or suffering," we would disagree with such a view based on our interpretation of the criminal statute.

The district court did not attempt to delineate the meaning of torture. It engaged in no statutory analysis. Instead, the court merely recited the definition and described the acts that it concluded constituted torture. This approach is representative of the approach most often taken in TVPA cases. The adoption of such an approach suggests that torture generally is of such an extreme nature—namely, the nature of acts are so shocking and obviously incredibly painful—that courts will more likely examine the totality of the circumstances, rather than engage in a careful parsing of the statute. A broad view of this case, and of the TVPA cases more generally, shows that only acts of an extreme nature have been redressed under the TVPA's civil remedy for torture. We note, however, that *Mehinovic* presents, with the exception of the single blow to Subasic, facts that are well over the line of what constitutes torture. While there are cases that fall far short of torture, see *infra* app., there are no cases that analyze what the lowest boundary of what constitutes torture. Nonetheless, while this case and the other TVPA cases generally do not approach that boundary, they are in keeping with the general notion that the term "torture" is reserved for acts of the most extreme nature.

## IV. International Decisions

International decisions can prove of some value in assessing what conduct might rise to the level of severe mental pain or suffering. Although decisions by foreign or international bodies are in no way binding authority upon the United States, they provide guidance about how other nations will likely react to our interpretation of the CAT and Section 2340. As this Part will discuss, other Western nations have generally used a high standard in determining whether interrogation techniques violate the international prohibition on torture. In fact, these decisions have found various aggressive interrogation methods to, at worst, constitute cruel, inhuman, and degrading treatment, but not torture. These decisions only reinforce our view that there is a clear distinction between the two standards and that only extreme conduct, resulting in pain that is of an intensity often accompanying serious physical injury, will violate the latter.

### A. European Court of Human Rights

An analogue to CAT's provisions can be found in the European Convention on Human Rights and Fundamental Freedoms (the "European Convention"). This convention prohibits torture, though it offers no definition of it. It also prohibits cruel,

inhuman, or degrading treatment or punishment. By barring both types of acts, the European Convention implicitly distinguishes between them and further suggests that torture is a grave act beyond cruel, inhuman, or degrading treatment or punishment. Thus, while neither the European Convention nor the European Court of Human Rights decisions interpreting that convention would be authority for the interpretation of Sections 2340–2340A, the European Convention decisions concerning torture nonetheless provide a useful barometer of the international view of what actions amount to torture.

The leading European Court of Human Rights case explicating the differences between torture and cruel, inhuman, or degrading treatment or punishment is *Ireland v. the United Kingdom* (1978).[15] In that case, the European Court of Human Rights examined interrogation techniques somewhat more sophisticated than the rather rudimentary and frequently obviously cruel acts described in the TVPA cases. Careful attention to this case is worthwhile not just because it examines methods not used in the TVPA cases, but also because the Reagan administration relied on this case in reaching the conclusion that the term torture is reserved in international usage for "extreme, deliberate, and unusually cruel practices." S. Treaty Doc. 100-20, at 4.

The methods at issue in *Ireland* were:

(1) Wall Standing. The prisoner stands spread eagle against the wall, with fingers high above his head, and feet back so that he is standing on his toes such that his all of his weight falls on his fingers.
(2) Hooding. A black or navy hood is placed over the prisoner's head and kept there except during the interrogation.
(3) Subjection to Noise. Pending interrogation, the prisoner is kept in a room with a loud and continuous hissing noise.
(4) Sleep Deprivation. Prisoners are deprived of sleep pending interrogation.
(5) Deprivation of Food and Drink. Prisoners receive a reduced diet during detention and pending interrogation.

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[15] According to one commentator, the Inter-American Court of Human Rights has also followed this decision. *See* Julie Lantrip, *Torture and Cruel, Inhuman and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights*, 5 ILSA J. Int'l & Comp. L. 551, 560–61 (1999). The Inter-American Convention to Prevent and Punish Torture, however, defines torture much differently than it is defined in CAT or U.S. law. *See* Inter-American Convention to Prevent and Punish Torture, opened for signature Dec. 9, 1985, art. 2, OAS T.S. No. 67 (entered into force Feb. 28, 1987 but the United States has never signed or ratified it). It defines torture as "any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish." Art. 2. While the Inter-American Convention to Prevent and Punish Torture does not require signatories to criminalize cruel, inhuman, or degrading treatment or punishment, the textual differences in the definition of torture are so great that it would be difficult to draw from that jurisprudence anything more than the general trend of its agreement with the *Ireland* decision.

The European Court of Human Rights concluded that these techniques used in combination, and applied for hours at a time, were inhuman and degrading but did not amount to torture. In analyzing whether these methods constituted torture, the court treated them as part of a single program. *See Ireland.* ¶ 104. The court found that this program caused "if not actual bodily injury, at least intense physical and mental suffering to the person subjected thereto and also led to acute psychiatric disturbances during the interrogation." *Id.* ¶ 167. Thus, this program "fell into the category of inhuman treatment[.]" *Id.* The court further found that "[t]he techniques were also degrading since they were such as to arouse in their victims feeling of fear, anguish and inferiority capable of humiliating and debasing them and possible [sic] breaking their physical or moral resistance." *Id.* Yet, the court ultimately concluded:

> Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confession, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular *intensity* and *cruelty* implied by the word torture . . .

*Id.* (emphasis added). Thus, even though the court had concluded that the techniques produce "intense physical and mental suffering" and "acute psychiatric disturbances," they were not sufficient intensity or cruelty to amount to torture.

The court reached this conclusion based on the distinction the European Convention drew between torture and cruel, inhuman, or degrading treatment or punishment. The court reasoned that by expressly distinguishing between these two categories of treatment, the European Convention sought to "attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering." *Id.* ¶ 167. According to the court, "this distinction derives principally from a difference in the intensity of the suffering inflicted." *Id.* The court further noted that this distinction paralleled the one drawn in the U.N. Declaration on the Protection From Torture, which specifically defines torture as "'an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.'" *Id.* (quoting U.N. Declaration on the Protection From Torture).

The court relied on this same "intensity/cruelty" distinction to conclude that some physical maltreatment fails to amount to torture. For example, four detainees were severely beaten and forced to stand spread eagle up against a wall. *See id.* ¶ 110. Other detainees were forced to stand spread eagle while an interrogator kicked them "continuously on the inside of the legs." *Id.* ¶ 111. Those detainees were beaten, some receiving injuries that were "substantial" and, others received "massive" injuries. *See id.* Another detainee was "subjected to . . . 'comparatively trivial' beatings" that resulted in a perforation of the detainee's eardrum and some "minor bruising." *Id.* ¶ 115. The court concluded that none of these situations "attain[ed] the particular level [of severity] inherent in the notion of torture." *Id.* ¶ 174.

## B. Israeli Supreme Court

The European Court of Human Rights is not the only other court to consider whether such a program of interrogation techniques was permissible. In *Public Committee Against Torture in Israel v. Israel*, 38 I.L.M. 1471 (1999), the Supreme Court of Israel reviewed a challenge brought against the General Security Service ("GSS") for its use of five techniques. At issue in *Public Committee Against Torture In Israel* were: (1) shaking, (2) the Shabach, (3) the Frog Crouch, (4) the excessive tightening of handcuffs, and (5) sleep deprivation. "Shaking" is "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly." *Id.* ¶ 9. The "Shabach" is actually a combination of methods wherein the detainee

> is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by an opaque sack, falling down to his shoulders. Powerfully loud music is played in the room.

*Id.* ¶ 10.

The "frog crouch" consists of "consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals." *Id.* ¶ 11. The excessive tightening of handcuffs simply referred to the use handcuffs that were too small for the suspects' wrists. *See id.* ¶ 12. Sleep deprivation occurred when the Shabach was used during "intense non-stop interrogations."[16] *Id.* ¶ 13.

While the Israeli Supreme Court concluded that these acts amounted to cruel, and inhuman treatment, the court did not expressly find that they amounted to torture. To be sure, such a conclusion was unnecessary because even if the acts amounted only to cruel and inhuman treatment the GSS lacked authority to use the five methods. Nonetheless, the decision is still best read as indicating that the acts at issue did not constitute torture. The court's descriptions of and conclusions about each method indicate that the court viewed them as merely cruel, inhuman or degrading but not of the sufficient severity to reach the threshold of torture. While its descriptions discuss necessity, dignity, degradation, and pain, the court carefully avoided describing any of these acts as having the severity of pain or suffering indicative of torture. *See id.* at ¶¶ 24–29. Indeed, in assessing the *Shabach* as a whole, the court even relied upon the European Court of Human Right's *Ireland* decision for supportand it did not evince disagreement with that decision's conclusion that the acts considered therein did not constitute torture. *See id.* ¶ 30.

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[16] The court did, however, distinguish between this sleep deprivation and that which occurred as part of routine interrogation, noting that some degree of interference with the suspect's regular sleep habits was to be expected. *Public Committee Against Torture in Israel* ¶ 23.

Moreover, the Israeli Supreme Court concluded that in certain circumstances GSS officers could assert a necessity defense. [17] CAT, however, expressly provides that "[n]o exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture." Art. 2(2). Had the court been of the view that the GSS methods constituted torture, the Court could not permit this affirmative defense under CAT. Accordingly, the court's decision is best read as concluding that these methods amounted to cruel and inhuman treatment, but not torture.

In sum, both the European Court on Human Rights and the Israeli Supreme Court have recognized a wide array of acts that constitute cruel, inhuman, or degrading treatment or punishment, but do not amount to torture. Thus, they appear to permit, under international law, an aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist.

## V. The President's Commander-in-Chief Power

Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.

### A. The War with Al Qaeda

At the outset, we should make clear the nature of the threat presently posed to the nation. While your request for legal advice is not specifically limited to the current circumstances, we think it is useful to discuss this question in the context of the current war against the al Qaeda terrorist network. The situation in which these issues arise is unprecedented in recent American history. Four coordinated terrorist attacks, using hijacked commercial airliners as guided missiles, took place in rapid succession on the

[17] In permitting a necessity defense, the court drew upon the ticking time bomb hypothetical proffered by the GSS as a basis for asserting a necessity defense. In that hypothetical, the GSS has arrested a suspect, who holds information about the location of a bomb and the time at which it is set to explode. The suspect is the only source of this information, and without that information the bomb will surely explode, killing many people. Under those circumstances, the court agreed that the necessity defense's requirement of imminence, which the court construed as the "imminent nature of the act rather than that of danger," would be satisfied. *Id.* ¶ 34. It further agreed "that in appropriate circumstances" this defense would be available to GSS investigators. *Id.* ¶ 35.

morning of September 11, 2001. These attacks were aimed at critical government buildings in the Nation's capital and landmark buildings in its financial center. These events reach a different scale of destructiveness than earlier terrorist episodes, such as the destruction of the Murrah Building in Oklahoma City in 1994. They caused thousands of deaths. Air traffic and communications within the United States were disrupted; national stock exchanges were shut for several days; and damage from the attack has been estimated to run into the tens of billions of dollars. Moreover, these attacks are part of a violent campaign against the United States that is believed to include an unsuccessful attempt to destroy an airliner in December 2001; a suicide bombing attack in Yemen on the *U.S.S. Cole* in 2000; the bombings of the United States Embassies in Kenya and in Tanzania in 1998; a truck bomb attack on a U.S. military housing complex in Saudi Arabia in 1996; an unsuccessful attempt to destroy the World Trade Center in 1993; and the ambush of U.S. servicemen in Somalia in 1993. The United States and its overseas personnel and installations have been attacked as a result of Usama Bin Laden's call for a "jihad against the U.S. government, because the U.S. government is unjust, criminal and tyrannical."[18]

In response, the Government has engaged in a broad effort at home and abroad to counter terrorism. Pursuant to his authorities as Commander-in-Chief, the President in October, 2001, ordered the Armed Forces to attack al Qaeda personnel and assets in Afghanistan, and the Taliban militia that harbored them. That military campaign appears to be nearing its close with the retreat of al Qaeda and Taliban forces from their strongholds and the installation of a friendly provisional government in Afghanistan. Congress has provided its support for the use of forces against those linked to the September 11 attacks, and has recognized the President's constitutional power to use force to prevent and deter future attacks both within and outside the United States. S. J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001). We have reviewed the President's constitutional power to use force abroad in response to the September 11 attacks in a separate memorandum. *See* Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) ("September 11 War Powers Memorandum"). We have also discussed the President's constitutional authority to deploy the armed forces domestically to protect against foreign terrorist attack in a separate memorandum. *See* Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States* at 2–3 (Oct. 17, 2001). The Justice Department and the FBI have launched a sweeping investigation in response to the September 11 attacks, and last fall Congress enacted legislation to expand the Justice Department's powers of surveillance against terrorists. *See* The USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). This spring, the President proposed the creation of a new cabinet

[18] *See Osama Bin Laden v. The U.S.: Edicts and Statements*, CNN Interview with Osama bin Laden, March 1997, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/edicts.html.

department for homeland security to implement a coordinated domestic program against terrorism.

Despite these efforts, numerous upper echelon leaders of al Qaeda and the Taliban, with access to active terrorist cells and other resources, remain at large. It has been reported that the al Qaeda fighters are already drawing on a fresh flow of cash to rebuild their forces. *See* Paul Haven, *U.S.: al-Qaida Trying to Regroup*, Associated Press, Mar. 20, 2002. As the Director of the Central Intelligence Agency has recently testified before Congress, "Al-Qa'ida and other terrorist groups will continue to plan to attack this country and its interests abroad. Their modus operandi is to have multiple attack plans in the works simultaneously, and to have al-Qa'ida cells in place to conduct them." Testimony of George J. Tenet, Director of Central Intelligence, Before the Senate Armed Services Committee at 2 (Mar. 19, 2002). Nor is the threat contained to Afghanistan. "Operations against US targets could be launched by al-Qa'ida cells already in place in major cities in Europe and the Middle East. Al-Qa'ida can also exploit its presence or connections to other groups in such countries as Somalia, Yemen, Indonesia, and the Philippines." *Id.* at 3. It appears that al Qaeda continues to enjoy information and resources that allow it to organize and direct active hostile forces against this country, both domestically and abroad.

Al Qaeda continues to plan further attacks, such as destroying American civilian airliners and killing American troops, which have fortunately been prevented. It is clear that bin Laden and his organization have conducted several violent attacks on the United States and its nationals, and that they seek to continue to do so. Thus, the capture and interrogation of such individuals is clearly imperative to our national security and defense. Interrogation of captured al Qaeda operatives may provide information concerning the nature of al Qaeda plans and the identities of its personnel, which may prove invaluable in preventing further direct attacks on the United States and its citizens. Given the massive destruction and loss of life caused by the September 11 attacks, it is reasonable to believe that information gained from al Qaeda personnel could prevent attacks of a similar (if not greater) magnitude from occurring in the United States. The case of Jose Padilla, a.k.a. Abdullah Al Mujahir, illustrates the importance of such information. Padilla allegedly had journeyed to Afghanistan and Pakistan, met with senior al Qaeda leaders, and hatched a plot to construct and detonate a radioactive dispersal device in the United States. After allegedly receiving training in wiring explosives and with a substantial amount of currency in his position, Padilla attempted in May, 2002, to enter the United States to further his scheme. Interrogation of captured al Qaeda operatives allegedly allowed U.S. intelligence and law enforcement agencies to track Padilla and to detain him upon his entry into the United States.

### B. Interpretation to Avoid Constitutional Problems

As the Supreme Court has recognized, and as we will explain further below, the President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces. Because both "[t]he executive power and the command of the military and naval forces is vested in the President," the

Supreme Court has unanimously stated that it is "*the President alone* [] who is constitutionally invested with the *entire charge of hostile operations*." *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (emphasis added). That authority is at its height in the middle of a war.

In light of the President's complete authority over the conduct of war, without a clear statement otherwise, we will not read a criminal statute as infringing on the President's ultimate authority in these areas. We have long recognized, and the Supreme Court has established a canon of statutory construction that statutes are to be construed in a manner that avoids constitutional difficulties so long as a reasonable alternative construction is available. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499–501, 504 (1979)) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe [a] statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). This canon of construction applies especially where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 800–1 (1992) (citation omitted) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the [Administrative Procedure Act]. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465–67 (1989) (construing Federal Advisory Committee Act not to apply to advice given by American Bar Association to the President on judicial nominations, to avoid potential constitutional question regarding encroachment on Presidential power to appoint judges).

In the area of foreign affairs, and war powers in particular, the avoidance canon has special force. *See, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 232–33 (1986) (construing federal statutes to avoid curtailment of traditional presidential prerogatives in foreign affairs). We do not lightly assume that Congress has acted to interfere with the President's constitutionally superior position as Chief Executive and Commander in Chief in the area of military operations. *See Egan*, 484 U.S. at 529 (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)). *See also Agee*, 453 U.S. at 291 (deference to Executive Branch is "especially" appropriate "in the area . . . of . . . national security").

In order to respect the President's inherent constitutional authority to manage a military campaign against al Qaeda and its allies, Section 2340A must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority. As our Office has consistently held during this Administration and previous Administrations, Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control

the conduct of operations during a war. *See, e.g.*, Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Swift Justice Authorization Act* (Apr. 8, 2002); Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sep. 25, 2001) ("Flanigan Memorandum"); Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Defense Authorization Act* (Sep. 15, 1995). As we discuss below, the President's power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander in Chief. A construction of Section 2340A that applied the provision to regulate the President's authority as Commander-in-Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions. Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we would construe Section 2340A to avoid this constitutional difficulty, and conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.

This approach is consistent with previous decisions of our Office involving the application of federal criminal law. For example, we have previously construed the congressional contempt statute not to apply to executive branch officials who refuse to comply with congressional subpoenas because of an assertion of executive privilege. In a published 1984 opinion, we concluded that

> if executive officials were subject to prosecution for criminal contempt whenever they carried out the President's claim of executive privilege, it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties. Therefore, the separation of powers principles that underlie the doctrine of executive privilege also would preclude an application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege.

*Prosecution for Contempt of Congress of an Executive Branch Offical Who Has Asserted A Claim of Executive Privilege*, 8 Op. O.L.C. 101, 134 (May 30, 1984). Likewise, we believe that, if executive officials were subject to prosecution for conducting interrogations when they were carrying out the President's Commander-in-Chief powers, "it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties." These constitutional principles preclude an application of Section 2340A to punish officials for aiding the President in exercising his exclusive constitutional authorities. *Id.*

## C. The Commander-in-Chief Power

It could be argued that Congress enacted 18 U.S.C. § 2340A with full knowledge and consideration of the President's Commander-in-Chief power, and that Congress intended to restrict his discretion in the interrogation of enemy combatants. Even were we to accept this argument, however, we conclude that the Department of Justice could not could not enforce Section 2340A against federal officials acting pursuant to the President's constitutional authority to wage a military campaign.

Indeed, in a different context, we have concluded that both courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to one of the President's constitutional powers. This Office, for example, has previously concluded that Congress could not constitutionally extend the congressional contempt statute to executive branch officials who refuse to comply with congressional subpoenas because of an assertion of executive privilege. We opined that "courts ... would surely conclude that a criminal prosecution for the exercise of a presumptively valid, constitutionally based privilege is not consistent with the Constitution." 8 Op. O.L.C. at 141. Further, we concluded that the Department of Justice could not bring a criminal prosecution against a defendant who had acted pursuant to an exercise of the President's constitutional power. "The President, through a United States Attorney, need not, indeed may not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege. Nor could the Legislative Branch or the courts require or implement the prosecution of such an individual." *Id.* Although Congress may define federal crimes that the President, through the Take Care Clause, should prosecute, Congress cannot compel the President to prosecute outcomes taken pursuant to the President's own constitutional authority. If Congress could do so, it could control the President's authority through the manipulation of federal criminal law.

We have even greater concerns with respect to prosecutions arising out of the exercise of the President's express authority as Commander in Chief than we do with prosecutions arising out of the assertion of executive privilege. In a series of opinions examining various legal questions arising after September 11, we have explained the scope of the President's Commander-in-Chief power.[19] We briefly summarize the findings of those opinions here. The President's constitutional power to protect the security of the United States and the lives and safety of its people must be understood in light of the Founders' intention to create a federal government "cloathed with all the powers requisite to the complete execution of its trust." *The Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because "the circumstances which may affect the public safety" are not "reducible within certain determinate limits,"

[19] *See, e.g.*, September 11 War Powers Memorandum; Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001).

> it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.

*Id.* at 147–48. Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the nation and its interests in accordance "with the realistic purposes of the entire instrument." *Lichter v. United States*, 334 U.S. 742, 782 (1948).

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. The decision to deploy military force in the defense of United States interests is expressly placed under Presidential authority by the Vesting Clause, U.S. Const. Art. I, § 1, cl. 1, and by the Commander-in-Chief Clause, *id.*, § 2, cl. 1.[20] This Office has long understood the Commander-in-Chief Clause in particular as an affirmative grant of authority to the President. *See, e.g.*, Memorandum for Charles W. Colson, Special Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970) ("Rehnquist Memorandum"). The Framers understood the Clause as investing the President with the fullest range of power understood at the time of the ratification of the Constitution as belonging to the military commander. In addition, the structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive—which includes the conduct of warfare and the defense of the nation—unless expressly assigned in the Constitution to Congress, is vested in the President. Article II, Section 1 makes this clear by stating that the "executive Power shall be vested in a President of the United States of America." That sweeping grant vests in the President an unenumerated "executive power" and contrasts with the specific enumeration of the powers—those "herein"—granted to Congress in Article I. The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions require the unity in purpose and energy in action that characterize the Presidency rather than Congress.[21]

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[20] *See Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (President has authority to deploy United States armed forces "abroad or to any particular region"); *Fleming v. Page*, 50 U.S. (9 How.) 603, 614–15 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual") *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (The "inherent powers" of the Commander in Chief "are clearly extensive."); *Maul v. United States*, 274 U.S. 501, 515-16 (1927) (Brandeis & Holmes, JJ., concurring) (President "may direct any revenue cutter to cruise in any waters in order to perform any duty of the service"); *Commonwealth of Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (the President has "power as Commander-in-Chief to station forces abroad"); *Ex parte Vallandigham*, 28 F.Cas. 874, 922 (C.C.S.D. Ohio 1863) (No. 16,816) (in acting "under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion"); *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 6 (Dec. 4, 1992) (Barr, Attorney General).

[21] Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack. As Justice Joseph Story said long ago, "[i]t may be fit and proper for the government, in the

As the Supreme Court has recognized, the Commander-in-Chief power and the President's obligation to protect the nation imply the ancillary powers necessary to their successful exercise. "The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, the grant of war power includes all that is necessary and proper for carrying those powers into execution." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950). In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. *See, e.g.*, Rehnquist Memorandum; Flanigan Memorandum at 3. The President's complete discretion in exercising the Commander-in-Chief power has been recognized by the courts. In the *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862), for example, the Court explained that whether the President "in fulfilling his duties as Commander in Chief" had appropriately responded to the rebellion of the southern states was a question "to be *decided by him*" and which the Court could not question, but must leave to "the political department of the Government to which this power was entrusted."

One of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy. *See, e.g.*, Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* at 3 (March 13, 2002) ("the Commander-in-Chief Clause constitutes an independent grant of substantive authority to engage in the detention and transfer of prisoners captured in armed conflicts"). It is well settled that the President may seize and detain enemy combatants, at least for the duration of the conflict, and the laws of war make clear that prisoners may be interrogated for information concerning the enemy, its strength, and its plans.[22] Numerous Presidents have ordered the capture, detention, and questioning of

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exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws." *The Apollon*, 22 U.S. (9 Wheat.) 362, 366–67 (1824). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat with whatever means are necessary. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."); *United States v. Smith*, 27 F. Cas. 1192, 1229-30 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is "the duty . . . of the executive magistrate . . . to repel an invading foe"); *see also* 3 Story, *Commentaries* § 1485 ("[t]he command and application of the public force . . . to maintain peace, and to resist foreign invasion" are executive powers).

[22] The practice of capturing and detaining enemy combatants is as old as war itself. *See* Allan Rosas, The Legal Status of Prisoners of War 44–45 (1976). In modern conflicts, the practice of detaining enemy combatants and hostile civilians generally has been designed to balance the humanitarian purpose of sparing lives with the military necessity of defeating the enemy on the battlefield. *Id.* at 59–80. While Article 17 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3517, places restrictions on interrogation of enemy combatants, members of al Qaeda and the Taliban militia are not legally entitled to the status of prisoners of war as defined in the Convention. *See* Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002).

enemy combatants during virtually every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. Recognizing this authority, Congress has never attempted to restrict or interfere with the President's authority on this score. *Id.*

Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President. There can be little doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign. Indeed, such operations may be of more importance in a war with an international terrorist organization than one with the conventional armed forces of a nation-state, due to the former's emphasis on secret operations and surprise attacks against civilians. It may be the case that only successful interrogations can provide the information necessary to prevent the success of covert terrorist attacks upon the United States and its citizens. Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

## VI. Defenses

In the foregoing parts of this memorandum, we have demonstrated that the ban on torture in Section 2340A is limited to only the most extreme forms of physical and mental harm. We have also demonstrated that Section 2340A, as applied to interrogations of enemy combatants ordered by the President pursuant to his Commander-in-Chief power would be unconstitutional. Even if an interrogation method, however, might arguably cross the line drawn in Section 2340, and application of the statute was not held to be an unconstitutional infringement of the President's Commander-in-Chief authority, we believe that under the current circumstances certain justification defenses might be available that would potentially eliminate criminal liability. Standard criminal law defenses of necessity and self-defense could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens.

### A. Necessity

We believe that a defense of necessity could be raised, under the current circumstances, to an allegation of a Section 2340A violation. Often referred to as the "choice of evils" defense, necessity has been defined as follows:

> Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Model Penal Code § 3.02. *See also* Wayne R. LaFave & Austin W. Scott, 1 Substantive Criminal Law § 5.4 at 627 (1986 & 2002 supp.) ("LaFave & Scott"). Although there is no federal statute that generally establishes necessity or other justifications as defenses to federal criminal laws, the Supreme Court has recognized the defense. *See United States v. Bailey*, 444 U.S. 394, 410 (1980) (relying on LaFave & Scott and Model Penal Code definitions of necessity defense).

The necessity defense may prove especially relevant in the current circumstances. As it has been described in the case law and literature, the purpose behind necessity is one of public policy. According to LaFave and Scott, "the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." LaFave & Scott, at 629. In particular, the necessity defense can justify the intentional killing of one person to save two others because "it is better that two lives be saved and one lost than that two be lost and one saved." *Id.* Or, put in the language of a choice of evils, "the evil involved in violating the terms of the criminal law (. . . even taking another's life) may be less than that which would result from literal compliance with the law ( . . . two lives lost)." *Id.*

Additional elements of the necessity defense are worth noting here. First, the defense is not limited to certain types of harms. Therefore, the harm inflicted by necessity may include intentional homicide, so long as the harm avoided is greater (i.e., preventing more deaths). *Id.* at 634. Second, it must actually be the defendant's intention to avoid the greater harm; intending to commit murder and then learning only later that the death had the fortuitous result of saving other lives will not support a necessity defense. *Id.* at 635. Third, if the defendant reasonably believed that the lesser harm was necessary, even if, unknown to him, it was not, he may still avail himself of the defense. As LaFave and Scott explain, "if A kills B reasonably believing it to be necessary to save C and D, he is not guilty of murder even though, unknown to A, C and D could have been rescued without the necessity of killing B." *Id.* Fourth, it is for the court, and not the defendant to judge whether the harm avoided outweighed the harm done. *Id.* at 636. Fifth, the defendant cannot rely upon the necessity defense if a third alternative is open and known to him that will cause less harm.

It appears to us that under the current circumstances the necessity defense could be successfully maintained in response to an allegation of a Section 2340A violation. On September 11, 2001, al Qaeda launched a surprise covert attack on civilian targets in the United States that led to the deaths of thousands and losses in the billions of dollars. According to public and governmental reports, al Qaeda has other sleeper cells within the

United States that may be planning similar attacks. Indeed, al Qaeda plans apparently include efforts to develop and deploy chemical, biological and nuclear weapons of mass destruction. Under these circumstances, a detainee may possess information that could enable the United States to prevent attacks that potentially could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.

Under this calculus, two factors will help indicate when the necessity defense could appropriately be invoked. First, the more certain that government officials are that a particular individual has information needed to prevent an attack, the more necessary interrogation will be. Second, the more likely it appears to be that a terrorist attack is likely to occur, and the greater the amount of damage expected from such an attack, the more that an interrogation to get information would become necessary. Of course, the strength of the necessity defense depends on the circumstances that prevail, and the knowledge of the government actors involved, when the interrogation is conducted. While every interrogation that might violate Section 2340A does not trigger a necessity defense, we can say that certain circumstances could support such a defense.

Legal authorities identify an important exception to the necessity defense. The defense is available "only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values." *Id.* at 629. Thus, if Congress explicitly has made clear that violation of a statute cannot be outweighed by the harm avoided, courts cannot recognize the necessity defense. LaFave and Israel provide as an example an abortion statute that made clear that abortions even to save the life of the mother would still be a crime; in such cases the necessity defense would be unavailable. *Id.* at 630. Here, however, Congress has not explicitly made a determination of values vis-à-vis torture. In fact, Congress explicitly removed efforts to remove torture from the weighing of values permitted by the necessity defense.[23]

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[23] In the CAT, torture is defined as the intentional infliction of severe pain or suffering "for such purpose[] as obtaining from him or a third person information or a confession." CAT art. 1.1. One could argue that such a definition represented an attempt to to indicate that the good of of obtaining information—no matter what the circumstances—could not justify an act of torture. In other words, necessity would not be a defense. In enacting Section 2340, however, Congress removed the purpose element in the definition of torture, evidencing an intention to remove any fixing of values by statute. By leaving Section 2340 silent as to the harm done by torture in comparison to other harms, Congress allowed the necessity defense to apply when appropriate.

Further, the CAT contains an additional provision that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." CAT art. 2.2. Aware of this provision of the treaty, and of the definition of the necessity defense that allows the legislature to provide for an exception to the defense, see Model Penal Code § 3.02(b), Congress did not incorporate CAT article 2.2 into Section 2340. Given that Congress omitted CAT's effort to bar a necessity or wartime defense, we read Section 2340 as permitting the defense.

## B. Self-Defense

Even if a court were to find that a violation of Section 2340A was not justified by necessity, a defendant could still appropriately raise a claim of self-defense. The right to self-defense, even when it involves deadly force, is deeply embedded in our law, both as to individuals and as to the nation as a whole. As the Court of Appeals for the D.C. Circuit has explained:

> More than two centuries ago, Blackstone, best known of the expositors of the English common law, taught that "all homicide is malicious, and of course amounts to murder, unless . . . excused on the account of accident or self-preservation. . . ." Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time.

*United States v. Peterson*, 483 F.2d 1222, 1228–29 (D.C. Cir. 1973). Self-defense is a common-law defense to federal criminal law offenses, and nothing in the text, structure or history of Section 2340A precludes its application to a charge of torture. In the absence of any textual provision to the contrary, we assume self-defense can be an appropriate defense to an allegation of torture.

The doctrine of self-defense permits the use of force to prevent harm to another person. As LaFave and Scott explain, "one is justified in using reasonable force in defense of another person, even a stranger, when he reasonably believes that the other is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger." *Id.* at 663–64. Ultimately, even deadly force is permissible, but "only when the attack of the adversary upon the other person reasonably appears to the defender to be a deadly attack." *Id.* at 664. As with our discussion of necessity, we will review the significant elements of this defense.[24] According to LaFave and Scott, the elements of the defense of others are the same as those that apply to individual self-defense.

First, self-defense requires that the use of force be *necessary* to avoid the danger of unlawful bodily harm. *Id.* at 649. A defender may justifiably use deadly force if he reasonably believes that the other person is about to inflict unlawful death or serious bodily harm upon another, and that it is necessary to use such force to prevent it. *Id.* at 652. Looked at from the opposite perspective, the defender may not use force when the force would be as equally effective at a later time and the defender suffers no harm or risk by waiting. *See* Paul H. Robinson, 2 Criminal Law Defenses § 131(c) at 77 (1984). If, however, other options permit the defender to retreat safely from a confrontation without having to resort to deadly force, the use of force may not be necessary in the first place. La Fave and Scott at 659–60.

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[24] Early cases had suggested that in order to be eligible for defense of another, one should have some personal relationship with the one in need of protection. That view has been discarded. LaFave & Scott at 664.

Second, self-defense requires that the defendant's belief in the necessity of using force be reasonable. If a defendant honestly but unreasonably believed force was necessary, he will not be able to make out a successful claim of self-defense. *Id.* at 654. Conversely, if a defendant reasonably believed an attack was to occur, but the facts subsequently showed no attack was threatened, he may still raise self-defense. As LaFave and Scott explain, "one may be justified in shooting to death an adversary who, having threatened to kill him, reaches for his pocket as if for a gun, though it later appears that he had no gun and that he was only reaching for his handkerchief." *Id.* Some authorities, such as the Model Penal Code, even eliminate the reasonability element, and require only that the defender honestly believed—regardless of its unreasonableness—that the use of force was necessary.

Third, many legal authorities include the requirement that a defender must reasonably believe that the unlawful violence is "imminent" before he can use force in his defense. It would be a mistake, however, to equate imminence necessarily with timing—that an attack is immediately about to occur. Rather, as the Model Penal Code explains, what is essential is that , the defensive *response* must be "immediately necessary." Model Penal Code § 3.04(1). Indeed, imminence may be merely another way of expressing the requirement of necessity. Robinson at 78. LaFave and Scott, for example, believe that the imminence requirement makes sense as part of a necessity defense because if an attack is not immediately upon the defender, the defender has other options available to avoid the attack that do not involve the use of force. LaFave and Scott at 656. If, however, the fact of the attack becomes certain and no other options remain, the use of force may be justified. To use a well-known hypothetical, if A were to kidnap and confine B, and then tell B he would kill B one week later, B would be justified in using force in self-defense, even if the opportunity arose before the week had passed. *Id.* at 656; *see also* Robinson at § 131(c)(1) at 78. In this hypothetical, while the attack itself is not imminent, B's use of force becomes immediately necessary whenever he has an opportunity to save himself from A.

Fourth, the amount of force should be proportional to the threat. As LaFave and Scott explain, "the amount of force which [the defender] may justifiably use must be reasonably related to the threatened harm which he seeks to avoid." LaFave and Scott at 651. Thus, one may not use deadly force in response to a threat that does not rise to death or serious bodily harm. If such harm may result, however, deadly force is appropriate. As the Model Penal Code § 3.04(2)(b) states, "[t]he use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat."

Under the current circumstances, we believe that a defendant accused of violating Section 2340A could have, in certain circumstances, grounds to properly claim the defense of another. The threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens. Whether such a defense will be upheld depends on the specific context within which the interrogation decision is made. If an attack appears increasingly likely, but our intelligence services and armed forces cannot prevent it without the information from the interrogation of a specific individual, then the

more likely it will appear that the conduct in question will be seen as necessary. If intelligence and other information support the conclusion that an attack is increasingly certain, then the necessity for the interrogation will be reasonable. The increasing certainty of an attack will also satisfy the imminence requirement. Finally, the fact that previous al Qaeda attacks have had as their aim the deaths of American citizens, and that evidence of other plots have had a similar goal in mind, would justify proportionality of interrogation methods designed to elicit information to prevent such deaths.

To be sure, this situation is different from the usual self-defense justification, and, indeed, it overlaps with elements of the necessity defense. Self-defense as usually discussed involves using force against an individual who is about to conduct the attack. In the current circumstances, however, an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack; rather, he has participated in the planning and preparation for the attack, or merely has knowledge of the attack through his membership in the terrorist organization. Nonetheless, leading scholarly commentators believe that interrogation of such individuals using methods that might violate Section 2340A would be justified under the doctrine of self-defense, because the combatant by aiding and promoting the terrorist plot "has culpably caused the situation where someone might get hurt. If hurting him is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible." Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280, 323 (1989) (symposium on Israel's Landau Commission Report).[25] Thus, some commentators believe that by helping to create the threat of loss of life, terrorists become culpable for the threat even though they do not actually carry out the attack itself. They may be hurt in an interrogation because they are part of the mechanism that has set the attack in motion, *id.* at 323, just as is someone who feeds ammunition or targeting information to an attacker. Under the present circumstances, therefore, even though a detained enemy combatant may not be the exact attacker—he is not planting the bomb, or piloting a hijacked plane to kill civilians—he still may be harmed in self-defense if he has knowledge of future attacks because he has assisted in their planning and execution.

Further, we believe that a claim by an individual of the defense of another would be further supported by the fact that, in this case, the nation itself is under attack and has the right to self-defense. This fact can bolster and support an individual claim of self-defense in a prosecution, according to the teaching of the Supreme Court in *In re Neagle*, 135 U.S. 1 (1890). In that case, the State of California arrested and held deputy U.S. Marshal Neagle for shooting and killing the assailant of Supreme Court Justice Field. In granting the writ of habeas corpus for Neagle's release, the Supreme Court did not rely alone upon the marshal's right to defend another or his right to self-defense. Rather, the Court found that Neagle, as an agent of the United States and of the executive branch, was justified in the killing because, in protecting Justice Field, he was acting pursuant to

[25] Moore distinguishes that case from one in which a person has information that could stop a terrorist attack, but who does not take a hand in the terrorist activity itself, such as an innocent person who learns of the attack from her spouse. Moore, 23 Israel L. Rev. at 324. Such individuals, Moore finds, would not be subject to the use of force in self-defense, although they might be under the doctrine of necessity.

the executive branch's inherent constitutional authority to protect the United States government. *Id.* at 67 ("We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death."). That authority derives, according to the Court, from the President's power under Article II to take care that the laws are faithfully executed. In other words, Neagle as a federal officer not only could raise self-defense or defense of another, but also could defend his actions on the ground that he was implementing the Executive Branch's authority to protect the United States government.

If the right to defend the national government can be raised as a defense in an individual prosecution, as *Neagle* suggests, then a government defendant, acting in his official capacity, should be able to argue that any conduct that arguably violated Section 2340A was undertaken pursuant to more than just individual self-defense or defense of another. In addition, the defendant could claim that he was fulfilling the Executive Branch's authority to protect the federal government, and the nation, from attack. The September 11 attacks have already triggered that authority, as recognized both under domestic and international law. Following the example of *In re Neagle*, we conclude that a government defendant may also argue that his conduct of an interrogation, if properly authorized, is justified on the basis of protecting the nation from attack.

There can be little doubt that the nation's right to self-defense has been triggered under our law. The Constitution announces that one of its purposes is "to provide for the common defense." U.S. Const., Preamble. Article I, § 8 declares that Congress is to exercise its powers to "provide for the common Defence." *See also* 2 Pub. Papers of Ronald Reagan 920, 921 (1988-89) (right of self-defense recognized by Article 51 of the U.N. Charter). The President has a particular responsibility and power to take steps to defend the nation and its people. *In re Neagle*, 135 U.S. at 64. *See also* U.S. Const., art. IV, § 4 ("The United States shall . . . protect [each of the States] against Invasion"). As Commander-in-Chief and Chief Executive, he may use the armed forces to protect the nation and its people. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). And he may employ secret agents to aid in his work as Commander-in-Chief. *Totten v. United States*, 92 U.S. 105, 106 (1876). As the Supreme Court observed in *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), in response to an armed attack on the United States "the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority." *Id.* at 668. The September 11 events were a direct attack on the United States, and as we have explained above, the President has authorized the use of military force with the support of Congress.[26]

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[26] While the President's constitutional determination alone is sufficient to justify the nation's resort to self-defense, it also bears noting that the right to self-defense is further recognized under international law. Article 51 of the U.N. Charter declares that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security." The attacks of September 11, 2001 clearly constitute an armed attack against the United States, and indeed were the latest in a long history of al Qaeda sponsored attacks against the United States. This conclusion was acknowledged by the United Nations Security Council on September 28, 2001, when it unanimously adopted Resolution 1373 explicitly "reaffirming the inherent right of individual and collective self-defence

As we have made clear in other opinions involving the war against al Qaeda, the nation's right to self-defense has been triggered by the events of September 11. If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network. In that case, we believe that he could argue that his actions were justified by the executive branch's constitutional authority to protect the nation from attack. This national and international version of the right to self-defense could supplement and bolster the government defendant's individual right.

**Conclusion**

For the foregoing reasons, we conclude that torture as defined in and proscribed by Sections 2340–2340A, covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. Additionally, such severe mental pain can arise only from the predicate acts listed in Section 2340. Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.

Further, we conclude that under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander-in-Chief powers may be unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability.

Please let us know if we can be of further assistance.

Jay S. Bybee
Assistant Attorney General

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as recognized by the charter of the United Nations." This right of self-defense is a right to effective self-defense. In other words, the victim state has the right to use force against the aggressor who has initiated an "armed attack" until the threat has abated. The United States, through its military and intelligence personnel, has a right recognized by Article 51 to continue using force until such time as the threat posed by al Qaeda and other terrorist groups connected to the September 11th attacks is completely ended." Other treaties re-affirm the right of the United States to use force in its self-defense. See, e.g., Inter-American Treaty of Reciprocal Assistance, art. 3, Sept. 2, 1947, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (Rio Treaty); North Atlantic Treaty, art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

## APPENDIX

Cases in which U.S. courts have concluded the defendant tortured the plaintiff:

- Plaintiff was beaten and shot by government troops while protesting the destruction of her property. *See Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887 at *7 (S.D.N.Y. Feb. 28, 2002).

- Plaintiff was removed from ship, interrogated, and held incommunicado for months. Representatives of defendant threatened her with death if she attempted to move from quarters where she was held. She was forcibly separated from her husband and unable to learn of his welfare or whereabouts. *See Simpson v. Socialist People's Libyan Arab Jamahiriya*, 180 F. Supp. 2d 78, 88 (D.D.C. 2001) (Rule 12(b)(6) motion).

- Plaintiff was held captive for five days in a small cell that had no lights, no window, no water, and no toilet. During the remainder of his captivity, he was frequently denied food and water and given only limited access to the toilet. He was held at gunpoint, with his captors threatening to kill him if he did not confess to espionage. His captors threatened to cut off his fingers, pull out his fingernails, and shock his testicles. *See Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22--23, 25 (D.D.C. 2001) (default judgment).

- Plaintiff was imprisoned for 205 days. He was confined in a car park that had been converted into a prison. His cell had no water or toilet and had only a steel cot for a bed. He was convicted of illegal entry into Iraq and transferred to another facility, where he was placed in a cell infested with vermin. He shared a single toilet with 200 other prisoners. While imprisoned he had a heart attack but was denied adequate medical attention and medication. *See Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22–23 (D.D.C. 2001) (default judgment).

- Plaintiff was imprisoned for 126 days. At one point, a guard attempted to execute him, but another guard intervened. A truck transporting the plaintiff ran over pedestrian at full speed without stopping. He heard other prisoners being beaten and he feared being beaten. He had serious medical conditions that were not promptly or adequately treated. He was not given sufficient food or water. *See Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 22–23 (D.D.C. 2001) (default judgment).

- Allegations that guards beat, clubbed, and kicked the plaintiff and that the plaintiff was interrogated and subjected to physical and verbal abuse sufficiently stated a claim for torture so as to survive Rule 12(b)(6) motion. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 110 F. Supp. 2d 10 (D.D.C. 2000).

- Plaintiffs alleged that they were blindfolded, interrogated and subjected to physical, mental, and verbal abuse while they were held captive. Furthermore,

one plaintiff was held eleven days without food, water, or bed. Another plaintiff was held for four days without food, water, or a bed, and was also stripped naked, blindfolded, and threatened with electrocution of his testicles. The other two remaining plaintiffs alleged that they were not provided adequate or proper medical care for conditions that were life threatening. The court concluded that these allegations sufficiently stated a claim for torture and denied defendants Rule 12(b)(6) motion. *See Daliberti v. Republic v. Iraq*, 97 F. Supp. 2d 38, 45 (D.D.C. 2000) (finding that these allegations were "more than enough to meet the definition of torture in the [TVPA]").

- Plaintiff's kidnappers pistol-whipped him until he lost consciousness. They then stripped him and gave him only a robe to wear and left him bleeding, dizzy, and in severe pain. He was then imprisoned for 1,908 days. During his imprisonment, his captors sought to force a confession from him by playing Russian Roulette with him and threatening him with castration. He was randomly beaten and forced to watch the beatings of others. Additionally, he was confined in a rodent and scorpion infested cell. He was bound in chains almost the entire time of his confinement. One night during the winter, his captors chained him to an upper floor balcony, leaving him exposed to the elements. Consequently, he developed frostbite on his hands and feet. He was also subjected to a surgical procedure for an unidentified abdominal problem. *See Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998).

- Plaintiff was kidnapped at gunpoint. He was beaten for several days after his kidnapping. He was subjected to daily torture and threats of death. He was kept in solitary confinement for two years. During that time, he was blindfolded and chained to the wall in a six-foot by six-foot room infested with rodents. He was shackled in a stooped position for 44 months and he developed eye infections as a result of the blindfolds. Additionally, his captors did the following: forced him to kneel on spikes, administered electric shocks to his hands; battered his feet with iron bars and struck him in the kidneys with a rifle; struck him on the side of his head with a hand grenade, breaking his nose and jaw; placed boiling tea kettles on his shoulders; and they laced his food with arsenic. *See Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C.1998).

- Plaintiff was pistol-whipped, bound and gagged, held captive in darkness or blindfold for 18 months. He was kept chained at either his ankles or wrists, wearing nothing but his undershorts and a t-shirt. As for his meals, his captors gave him pita bread and dry cheese for breakfast, rice with dehydrated soup for lunch, and a piece of bread for dinner. Sometimes the guards would spit into his food. He was regularly beaten and incessantly interrogated; he overheard the deaths and beatings of other prisoners. *See Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, (D.D.C.1998).

- Plaintiff spent eight years in solitary or near solitary confinement. He was threatened with death, blindfolded and beaten while handcuffed and fettered. He

was denied sleep and repeatedly threatened him with death. At one point, while he was shackled to a cot, the guards placed a towel over his nose and mouth and then poured water down his nostrils. They did this for six hours. During this incident, the guards threatened him with death and electric shock. Afterwards, they left him shackled to his cot for six days. For the next seven months, he was imprisoned in a hot, unlit cell that measured 2.5 square meters. During this seven-month period, he was shackled to his cot—at first by all his limbs and later by one hand or one foot. He remained shackled in this manner except for the briefest moments, such as when his captors permitted him to use the bathroom. The handcuffs cut into his flesh. *See Hilao v. Estate of Marcos*, 103 F.3d 789, 790 (9th Cir. 1996). The court did not, however, appear to consider the solitary confinement per se to constitute torture. *See id.* at 795 (stating that to the extent that [the plaintiff's] years in solitary confinement do not constitute torture, they clearly meet the definition of prolonged arbitrary detention.").

- High-ranking military officers interrogated the plaintiff and subjected him to mock executions. He was also threatened with death. *See Hilao v. Estate of Marcos*, 103 F.3d 789, 795 (9th Cir. 1996).

- Plaintiff, a nun, received anonymous threats warning her to leave Guatemala. Later, two men with a gun kidnapped her. They blindfolded her and locked her in an unlit room for hours. The guards interrogated her and regardless of the answers she gave to their questions, they burned her with cigarettes. The guards then showed her surveillance photographs of herself. They blindfolded her again, stripped her, and raped her repeatedly. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 176 (1995).

- Plaintiffs were beaten with truncheons, boots, and guns and threatened with death. Nightsticks were used to beat their backs, kidneys, and the soles of their feet. The soldiers pulled and squeezed their testicles. When they fainted from the pain, the soldiers revived them by singeing their nose hair with a cigarette lighter. They were interrogated as they were beaten with iron barks, rifle butts, helmets, and fists. One plaintiff was placed in the "djak" position, *i.e.*, with hands and feet bound and suspended from a pole. Medical treatment was withheld for one week and then was sporadic and inadequate. *See Paul v. Avril*, 901 F. Supp. 330, 332 (S.D. Fla. 1994).

- Alien subjected to sustained beatings for the month following his first arrest. After his second arrest, suffered severe beatings and was burned with cigarettes over the course of an eight-day period. *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (deportation case).

- Decedent was attacked with knifes and sticks, and repeatedly hit in the head with the butt of a gun as he remained trapped in his truck by his attackers. The attackers then doused the vehicle with gasoline. Although he managed to get out

of the truck, he nonetheless burned to death. *Tachiona v. Mugabe*, No. 00 Civ. 6666VMJCF, 2002 WL 1424598 at *1 (S.D.N.Y. July 1, 2002).

- Decedent was attacked by spear, stick, and stone wielding supporters of defendant. He was carried off by the attackers and "was found dead the next day, naked and lying in the middle of the road[.]" From the physical injuries, it was determined that the had been severely beaten. According to his death certificate, he died from "massive brain injury from trauma; [] assault; and [] laceration of the right lung." *Tachiona v. Mugabe*, No. 00 Civ. 6666VMJCF, 2002 WL 1424598 at *2 (S.D.N.Y. July 1, 2002).

- Decedent was abducted, along with five others. He and the others were severely beaten and he was forced to drink diesel oil. He was then summarily executed. *Tachiona v. Mugabe*, No. 00 Civ. 6666VMJCF, 2002 WL 1424598 at *4 (S.D.N.Y. July 1, 2002).

- Forced sterilization constitutes torture. *Bi Zhu Lin v. Ashcroft*, 183 F. Supp. 2d 551 (D. Conn. 2002) (noting determination by immigration judge that such conduct constitutes torture).

There are two cases in which U.S. courts have rejected torture claims on the ground that the alleged conduct did not rise to the level of torture. In *Faulder v. Johnson*, 99 F. Supp. 2d 774 (S.D. Tex. 1999), the district court rejected a death row inmate's claim that psychological trauma resulting from repeated stays of his execution and his 22-year-wait for that execution was torture under CAT. The court rejected this contention because of the United States' express death penalty reservation to CAT. *See id.* In *Eastman Kodak v. Kavlin*, 978 F. Supp. 1078, 1093 (S.D. Fla. 1997), the plaintiff was held for eight days in a filthy cell with drug dealers and an AIDS patient. He received no food, no blanket and no protection from other inmates. Prisoners murdered one another in front of the plaintiff. *Id.* The court flatly rejected the plaintiff's claim that this constituted torture.

**September 11, 2002**

**Memorandum From: Assistant Secretary for Economic Policy, Richard Clarida**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: Economic Impact of War with Iraq - Briefing of Vice President Richard Cheney**

**DEPARTMENT OF THE TREASURY**
WASHINGTON, D.C. 20220

**BRIEFING**

September 11, 2002

MEMORANDUM FOR SECRETARY O'NEILL

FROM: Richard Clarida
Assistant Secretary for Economic Policy

SUBJECT: Briefing for Your Lunch with Vice President Cheney on the Economic Impact of a War with Iraq

*The economic repercussions of a war with Iraq would be wide and complex. The following memorandum addresses the most immediate effect of such a war, which would be a hike in oil prices. It is unlikely that higher prices alone would derail the expansion. We estimate that in the "worst-case" scenario ($20 per barrel spike for one year), real GDP would be reduced by 0.9 percentage point from the 3.1 percent expected without higher oil prices. The effect of a war on financial markets and consumer and business confidence has not been included in this evaluation.*

## Recent Developments

The one-month futures **price of West Texas Intermediate (WTI) crude oil** closed at $29.73 per barrel on September 10, only slightly below the 15-month high of $29.84 reached in mid August. Crude has now risen by more than $8.50 (40 percent) since the beginning of the year. The current price is roughly 7 percent above the year-earlier level. The increases in the price of oil this year have been strongly correlated with general turmoil in the Middle East and the seemingly growing possibility of military confrontation between the U.S. and Iraq. Private analysts estimate that the current **"war premium"** on the price of crude is roughly $5 per barrel.

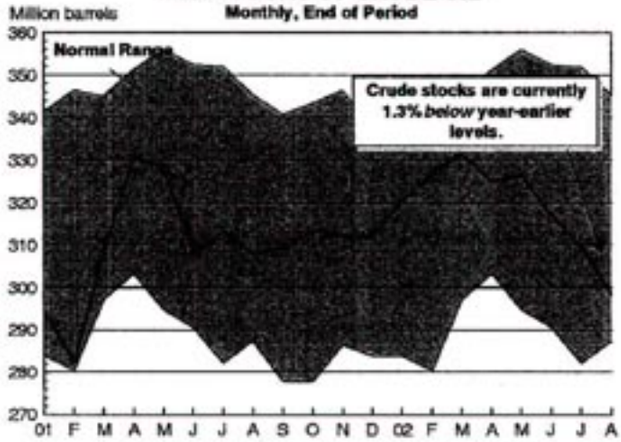
Part of the run up in oil prices has been driven by oil market fundamentals. The ongoing effects of OPEC oil production cuts during 2001 along with erratic Iraqi crude production have led to tighter supplies of crude oil. **U.S. crude oil inventories** slipped to 298.5 million barrels at the end of August (latest data available), the lowest level since March 2001. Inventories are now 1.3 percent below the year-earlier level and nearly 9 percent lower than the monthly average for August over the past 10 years.

**DOMESTIC CRUDE OIL PRICES - MONTHLY**
One-Month Futures Price, West Texas Intermediate
(Dollars per Barrel)



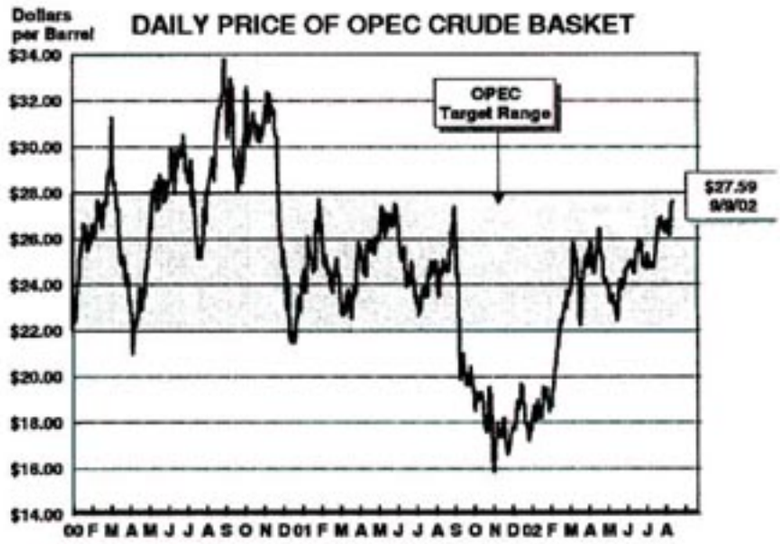

* Average through Sep 10

**U.S. STOCKS OF CRUDE OIL**
Monthly, End of Period

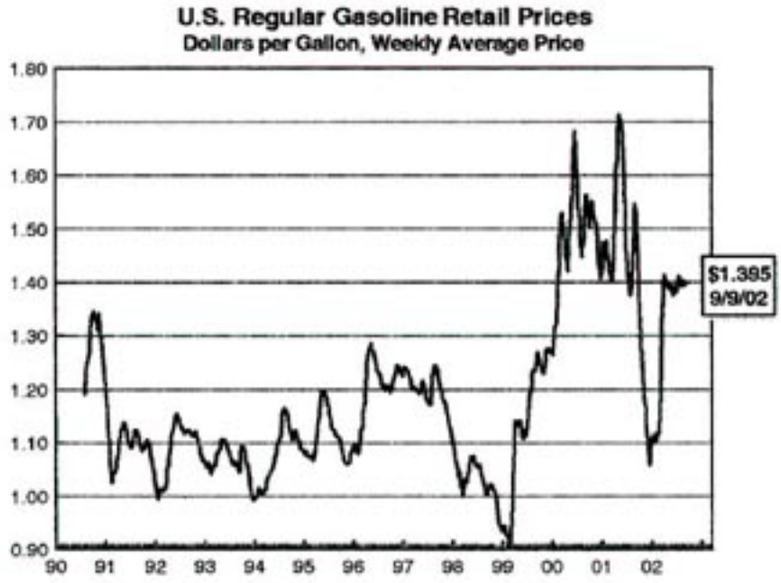



Does not include SPR. Normal range based on average stock levels from 1991 to 2001. August 2002 reflects level as of August 30.

Low oil supply magnifies the importance of the September 19 **OPEC** meeting, at which the group will decide upon the future course of its production levels. OPEC officials have been unclear about prospects for a quota increase. On the whole, analysts believe OPEC will raise production, especially with the coming of the Northern Hemisphere winter, a time of additional oil demand. The price of OPEC's benchmark basket of oils has recently been at the upper bound of its $22 - $28 per barrel target price band. On September 9, the OPEC basket rose to $27.59 per barrel, the highest level since February 2001.




Although oil prices have been rising, gasoline prices so far have remained relatively stable. The average price of **retail gasoline** in the U.S. stood at $1.39 per gallon in the week of September 9, little changed since mid April and nearly 10 percent lower than the year-earlier level (see chart to right). Ample gasoline inventories and a lack of supply bottlenecks have helped to keep gasoline prices contained this summer in contrast to the sharp price spikes of 2001. Still, current prices at the pump are 12 percent above the average retail gasoline price at the beginning of September during the latter half of the 1990s. In its latest Short-Term Energy Outlook (released September 6), the Energy Information Administration (EIA) expects retail prices to rise by about $0.12 (9 percent) from an average of $1.38 per gallon this year to an average of $1.50 per gallon in 2003.




## Near-term Outlook for Supply and Prices

While a U.S. war with Iraq would almost certainly lead the latter to halt oil exports, significant alternative sources of oil could quickly fill the gap and any spike in oil prices would likely be short-lived. On Thursday, September 5, OPEC (excluding Iraq) pledged to use its resources to keep oil markets stable during this time of increasing tensions between the United States and Iraq. The cartel currently has more than enough **spare production capacity** to cover Iraqi exports, which have averaged roughly 1.2 million barrels per day so far this year (not including an estimated 200,000 to 300,000 barrels per day in smuggled oil shipments).

Saudi Arabia alone (which currently accounts for 14 percent of U.S. petroleum imports) could make up for lost Iraqi supply with its roughly 2.4 million barrels per day of excess production capacity. The nine remaining OPEC members combined have an estimated 2.6 million barrels per day of spare capacity.

**Top 5 Sources of U.S. Petroleum Imports* - 2001**

| | |
|---|---|
| (1) Canada | 15.4% |
| (2) Saudi Arabia | 14.0% |
| (3) Venezuela | 13.1% |
| (4) Mexico | 12.1% |
| (5) Nigeria | 7.5% |
| Memo: | |
| OPEC | 46.6% |
| Persian Gulf OPEC | 23.3% |
| Iraq | 6.7% |
| NonOPEC | 53.4% |
| W. Hemisphere | 48.5% |

*Includes crude oil and petroleum products.

Fundamental **differences between the current situation and that of 12 years ago** should also help to prevent a prolonged period of dramatically higher prices. Markets have had ample time to digest the possibility of a military conflict with Iraq this time around, unlike in 1990 when Iraq unexpectedly invaded Kuwait. At that time, fears that Iraq would disrupt Saudi oil exports in retaliation for that country's support of the U.S.-led military campaign against Iraq was also a factor in the price spike. This time around, Saudi Arabia has not publicly backed the Bush Administration's position on Iraq, making it less likely that Iraq would try to interfere with Saudi oil exports. These factors, along with OPEC assurances that the group will keep their spigots open, have held the "war premium" to a relatively moderate $5 thus far.

## Economic Impact of Oil Supply Disruption/ Price Increase

Despite the analysis above, there is concern that an additional increase in oil prices – over and above the roughly $5 a barrel war premium seen so far – would accompany the initial phases of the conflict. The economic effects of the oil price increase depend on how much oil prices rise and how long the oil price increase is sustained.

The table at the top of the next page shows the short-run consequences of **four hypothetical paths** for oil prices over the next four quarters, using simulations of the *Macroeconomic Advisers (MA)* econometric model. The current consensus forecasts for real GDP growth, the unemployment rate, and consumer price inflation were taken from the September 10 *Blue Chip Economic Indicators.*

The current average oil price in the table is taken from the most recent *Macroeconomic Advisers* forecast (*Blue Chip* does not provide an oil price forecast). The *MA* oil price forecast averages $25.90 a barrel for the four quarters starting in the third quarter of 2002. (The September 6 EIA forecast projects an oil price of $26.21 per barrel for this same period.) *MA* projects a $2.50 increase in oil prices through the end of this year followed by a similar decline through the end of 2003, so that, by the end of 2003, the price of oil has returned to its Q2:2002 level of $24 a barrel, using the refiner acquisition cost (RAC) of imported oil as the price measure (the oil price indicator used in the *MA* model).

The table shows that the effects of oil price increases about the size of the current war premium are small but noticeable. A sustained doubling of the war premium -- $10 a barrel increase in oil prices -- reduces real GDP growth by about 0.5 percentage point over the next year. In the **worst case** shown here, where oil prices are increased by $20 a barrel for the four quarters ending in the second quarter of 2003, real GDP growth during that period would be reduced by 0.9 percentage point and the unemployment rate would be 0.3 percentage point higher. Consumer price inflation would be 1.4 percentage points higher.

**Short-Term Effects of Different Oil Price Scenarios on the Consensus Outlook**

| | | War Premium on Oil Prices, $/barrel (refiner acquisition cost imported oil) | | | |
|---|---|---|---|---|---|
| | | Scenario 1 | Scenario 2 | Scenario 3 | Scenario 4 |
| | Current Consensus Expectations | $5 for 4 quarters | $10 for 4 quarters | $20 for 2 quarters, followed by $10 for 2 quarters | $20 for 4 quarters |
| Real GDP growth, % , 2002Q2-2003Q2 | 3.1 | 2.8 | 2.6 | 2.5 | 2.2 |
| Unemployment rate, % 2003Q2 | 5.8 | 5.9 | 6.0 | 6.0 | 6.1 |
| CPI inflation, %, 2002Q2-2003Q2 | 2.1 | 2.6 | 2.8 | 3.0 | 3.5 |
| Average oil price, dollars/barrel RAC, imports, 2002Q3-2003Q3 | 25.90 | 30.90 | 35.90 | 40.90 | 45.90 |

The oil price increases in the worst case scenario shown here are – in terms of their increase from the pre-war oil price on a *dollar basis* – larger than those that occurred in the early phases of the **1990-91 Gulf War**. After Iraq invaded Kuwait in August 1990, the RAC imported price rose from a quarterly average of $16 a barrel in the second quarter of 1990 to about $24 in the third quarter and nearly $30 in the fourth quarter. Prices fell back to an average of nearly $20 a barrel in the first quarter of 1991. On a *percentage basis*, to match the 1990 experience, oil prices would have to double -- rising to about $50 a barrel for imported RAC. Experiments with the MA model suggested that a 2-quarter doubling of oil prices followed by a rapid decline in prices as in the 1990-91 experience would produce results similar to scenario 3 in the table above.

All of these simulations assume that **interest rates remain at their baseline forecasted levels**. This amounts to assuming on the short end of the maturity spectrum that the Federal Reserve does not change rates in response to the modest changes in the economic outlook. At the long end of the maturity spectrum this amounts to assuming that long-term inflation expectations do not change appreciably with the oil price increase.

## Other Considerations

While the estimates shown above of the economic impact of a war with Iraq are limited to the effect of a spike in oil prices, there are a number of other considerations that merit further study. Among them are the impact on financial markets (both equities and interest rates), the effect on business confidence (hiring and investment decisions), and the effect on consumer confidence (consumer spending and residential investment behavior).

For example, most analysts expect that the initiation of hostilities would cause consumer confidence to drop, jeopardizing consumer spending growth, and further reducing GDP growth. However, the case for the confidence channel is less than clear. The Iraqi invasion of Kuwait initially caused consumer confidence to drop in 1990, but after it was apparent that Operation Desert Storm was going well, consumer confidence jumped. Drawing an analogy from the 1990-91 period, the current weakness in consumer confidence may reflect the uncertainty before the outbreak of a shooting war. Even if confidence were to fall sharply, the measurable links between spending and confidence are tenuous. Nevertheless, for large declines in confidence, it seems likely that consumer spending would be affected over and above what is shown in the previous table. Confidence effects are not restricted to consumers. Business confidence could react adversely to war, which could affect both capital spending and hiring decisions. Likewise, the effects on equity markets, corporate credit markets and currency markets are hard to project but could be important.

**October, 2002**

# National Intelligence Estimate, Iraq's Continuing Programs for Weapons of Mass Destruction, October 2002.

## Key Judgments (from October 2002 NIE)

# Iraq's Continuing Programs for Weapons of Mass Destruction

**We judge that Iraq has continued its weapons of mass destruction (WMD) programs in defiance of UN resolutions and restrictions. Baghdad has chemical and biological weapons as well as missiles with ranges in excess of UN restrictions; if left unchecked, it probably will have a nuclear weapon during this decade. (See INR alternative view at the end of these Key Judgments.)**

**We judge that we are seeing only a portion of Iraq's WMD efforts, owing to Baghdad's vigorous denial and deception efforts. Revelations after the Gulf war starkly demonstrate the extensive efforts undertaken by Iraq to deny information. We lack specific information on many key aspects of Iraq's WMD programs.**

**Since inspections ended in 1998, Iraq has maintained its chemical weapons effort, energized its missile program, and invested more heavily in biological weapons; in the view of most agencies, Baghdad is reconstituting its nuclear weapons program.**

- Iraq's growing ability to sell oil illicitly increases Baghdad's capabilities to finance WMD programs; annual earnings in cash and goods have more than quadrupled, from $580 million in 1998 to about $3 billion this year.

- Iraq has largely rebuilt missile and biological weapons facilities damaged during Operation Desert Fox and has expanded its chemical and biological infrastructure under the cover of civilian production.

- Baghdad has exceeded UN range limits of 150 km with its ballistic missiles and is working with unmanned aerial vehicles (UAVs), which allow for a more lethal means to deliver biological and, less likely, chemical warfare agents.

- Although we assess that Saddam does not *yet* have nuclear weapons or sufficient material to make any, he remains intent on acquiring them. Most agencies assess that Baghdad started reconstituting its nuclear program about the time that UNSCOM inspectors departed—December 1998.

**How quickly Iraq will obtain its first nuclear weapon depends on when it acquires sufficient weapons-grade fissile material.**

- If Baghdad acquires sufficient fissile material from abroad it could make a nuclear weapon within several months to a year.

- Without such material from abroad, Iraq probably would not be able to make a weapon until 2007 to 2009, owing to inexperience in building and operating centrifuge facilities to produce highly enriched uranium and challenges in procuring the necessary equipment and expertise.

  - Most agencies believe that Saddam's personal interest in and Iraq's aggressive attempts to obtain high-strength aluminum tubes for centrifuge rotors—as well as Iraq's attempts to acquire magnets, high-speed balancing machines, and machine tools—provide compelling evidence that Saddam is reconstituting a uranium enrichment effort for Baghdad's nuclear weapons program. (DOE agrees that reconstitution of the nuclear program is underway but assesses that the tubes probably are not part of the program.)

  - Iraq's efforts to re-establish and enhance its cadre of weapons personnel as well as activities at several suspect nuclear sites further indicate that reconstitution is underway.

  - All agencies agree that about 25,000 centrifuges based on tubes of the size Iraq is trying to acquire would be capable of producing approximately two weapons' worth of highly enriched uranium per year.

- In a much less likely scenario, Baghdad could make enough fissile material for a nuclear weapon by 2005 to 2007 if it obtains suitable centrifuge tubes this year and has all the other materials and technological expertise necessary to build production-scale uranium enrichment facilities.

**We assess that Baghdad has begun renewed production of mustard, sarin, GF (cyclosarin), and VX; its capability probably is more limited now than it was at the time of the Gulf war, although VX production and agent storage life probably have been improved.**

- An array of clandestine reporting reveals that Baghdad has procured covertly the types and quantities of chemicals and equipment sufficient to allow limited CW agent production hidden within Iraq's legitimate chemical industry.

- Although we have little specific information on Iraq's CW stockpile, Saddam probably has stocked at least 100 metric tons (MT) and possibly as much as 500 MT of CW agents—much of it added in the last year.

- The Iraqis have experience in manufacturing CW bombs, artillery rockets, and projectiles. We assess that that they possess CW bulk fills for SRBM warheads, including for a limited number of covertly stored Scuds, possibly a few with extended ranges.

**We judge that all key aspects—R&D, production, and weaponization—of Iraq's offensive BW program are active and that most elements are larger and more advanced than they were before the Gulf war.**

- We judge Iraq has some lethal and incapacitating BW agents and is capable of quickly producing and weaponizing a variety of such agents, including anthrax, for delivery by bombs, missiles, aerial sprayers, and covert operatives.

- Chances are even that smallpox is part of Iraq's offensive BW program.

- Baghdad probably has developed genetically engineered BW agents.

- Baghdad has established a large-scale, redundant, and concealed BW agent production capability.

  - Baghdad has mobile facilities for producing bacterial and toxin BW agents; these facilities can evade detection and are highly survivable. Within three to six months* these units probably could produce an amount of agent equal to the total that Iraq produced in the years prior to the Gulf war.

**Iraq maintains a small missile force and several development programs, including for a UAV probably intended to deliver biological warfare agent.**

- Gaps in Iraqi accounting to UNSCOM suggest that Saddam retains a covert force of up to a few dozen Scud-variant SRBMs with ranges of 650 to 900 km.

- Iraq is deploying its new al-Samoud and Ababil-100 SRBMs, which are capable of flying beyond the UN-authorized 150-km range limit; Iraq has tested an al-Samoud variant beyond 150 km—perhaps as far as 300 km.

- Baghdad's UAVs could threaten Iraq's neighbors, US forces in the Persian Gulf, *and if brought close to, or into, the United States, the US Homeland.*

  - An Iraqi UAV procurement network attempted to procure commercially available route planning software and an associated topographic database that would be able to support targeting of the United States, according to analysis of special intelligence.

  - The Director, Intelligence, Surveillance, and Reconnaissance, US Air Force, does not agree that Iraq is developing UAVs *primarily* intended to be delivery platforms for chemical and biological warfare (CBW) agents. The small size of Iraq's new UAV strongly suggests a primary role of reconnaissance, although CBW delivery is an inherent capability.

- Iraq is developing medium-range ballistic missile capabilities, largely through foreign assistance in building specialized facilities, including a test stand for engines more powerful than those in its current missile force.

**We have low confidence in our ability to assess when Saddam would use WMD.**

- Saddam could decide to use chemical and biological warfare (CBW) preemptively against US forces, friends, and allies in the region in an attempt to disrupt US war preparations and undermine the political will of the Coalition.

*[Corrected per Errata sheet issued in October 2002]

- Saddam might use CBW after an initial advance into Iraqi territory, but early use of WMD could foreclose diplomatic options for stalling the US advance.

- He probably would use CBW when he perceived he irretrievably had lost control of the military and security situation, but we are unlikely to know when Saddam reaches that point.

- We judge that Saddam would be more likely to use chemical weapons than biological weapons on the battlefield.

- Saddam historically has maintained tight control over the use of WMD; however, he probably has provided contingency instructions to his commanders to use CBW in specific circumstances.

**Baghdad for now appears to be drawing a line short of conducting terrorist attacks with conventional or CBW against the United States, fearing that exposure of Iraqi involvement would provide Washington a stronger cause for making war.**

**Iraq probably would attempt clandestine attacks against the US Homeland if Baghdad feared an attack that threatened the survival of the regime were imminent or unavoidable, or possibly for revenge. Such attacks—more likely with biological than chemical agents—probably would be carried out by special forces or intelligence operatives.**

- The Iraqi Intelligence Service (IIS) probably has been directed to conduct clandestine attacks against US and Allied interests in the Middle East in the event the United States takes action against Iraq. The IIS probably would be the primary means by which Iraq would attempt to conduct any CBW attacks on the US Homeland, although we have no specific intelligence information that Saddam's regime has directed attacks against US territory.

**Saddam, if sufficiently desperate, might decide that only an organization such as al-Qa'ida—with worldwide reach and extensive terrorist infrastructure, and already engaged in a life-or-death struggle against the United States—could perpetrate the type of terrorist attack that he would hope to conduct.**

- In such circumstances, he might decide that the extreme step of assisting the Islamist terrorists in conducting a CBW attack against the United States would be his last chance to exact vengeance by taking a large number of victims with him.

**State/INR Alternative View of Iraq's Nuclear Program**

The Assistant Secretary of State for Intelligence and Research (INR) believes that Saddam continues to want nuclear weapons and that available evidence indicates that Baghdad is pursuing at least a limited effort to maintain and acquire nuclear weapon-related capabilities. The activities we have detected do not, however, add up to a compelling case that Iraq is currently pursuing what INR would consider to be an integrated and comprehensive approach to

*(continued on next page...)*

*(continued ...)* **State/INR Alternative View**

acquire nuclear weapons. Iraq may be doing so, but INR considers the available evidence inadequate to support such a judgment. Lacking persuasive evidence that Baghdad has launched a coherent effort to reconstitute its nuclear weapons program, INR is unwilling to speculate that such an effort began soon after the departure of UN inspectors or to project a timeline for the completion of activities it does not now see happening. As a result, INR is unable to predict when Iraq could acquire a nuclear device or weapon.

In INR's view Iraq's efforts to acquire aluminum tubes is central to the argument that Baghdad is reconstituting its nuclear weapons program, but INR is not persuaded that the tubes in question are intended for use as centrifuge rotors. INR accepts the judgment of technical experts at the U.S. Department of Energy (DOE) who have concluded that the tubes Iraq seeks to acquire are poorly suited for use in gas centrifuges to be used for uranium enrichment and finds unpersuasive the arguments advanced by others to make the case that they are intended for that purpose. INR considers it far more likely that the tubes are intended for another purpose, most likely the production of artillery rockets. The very large quantities being sought, the way the tubes were tested by the Iraqis, and the atypical lack of attention to operational security in the procurement efforts are among the factors, in addition to the DOE assessment, that lead INR to conclude that the tubes are not intended for use in Iraq's nuclear weapon program.

**Confidence Levels for Selected Key Judgments in This Estimate**

**High Confidence:**

- Iraq is continuing, and in some areas expanding, its chemical, biological, nuclear and missile programs contrary to UN resolutions.
- We are not detecting portions of these weapons programs.
- Iraq possesses proscribed chemical and biological weapons and missiles.
- Iraq could make a nuclear weapon in months to a year once it acquires sufficient weapons-grade fissile material.

**Moderate Confidence:**

- Iraq does not yet have a nuclear weapon or sufficient material to make one but is likely to have a weapon by 2007 to 2009. (See INR alternative view, page 84).

**Low Confidence:**

- When Saddam would use weapons of mass destruction.
- Whether Saddam would engage in clandestine attacks against the US Homeland.
- Whether in desperation Saddam would share chemical or biological weapons with al-Qa'ida.

*Uranium Acquisition.* Iraq retains approximately two-and-a-half tons of 2.5 percent enriched uranium oxide, which the IAEA permits. This low-enriched material could be used as feed material to produce enough HEU for about two nuclear weapons. The use of enriched feed material also would reduce the initial number of centrifuges that Baghdad would need by about half. Iraq could divert this material—the IAEA inspects it only once a year—and enrich it to weapons

grade before a subsequent inspection discovered it was missing. The IAEA last inspected this material in late January 2002.

Iraq has about 550 metric tons of yellowcake[1] and low-enriched uranium at Tuwaitha, which is inspected annually by the IAEA. Iraq also began vigorously trying to procure uranium ore and yellowcake; acquiring either would shorten the time Baghdad needs to produce nuclear weapons.

- A foreign government service reported that as of early 2001, Niger planned to send several tons of "pure uranium" (probably yellowcake) to Iraq. As of early 2001, Niger and Iraq reportedly were still working out arrangements for this deal, which could be for up to 500 tons of yellowcake. We do not know the status of this arrangement.

- Reports indicate Iraq also has sought uranium ore from Somalia and possibly the Democratic Republic of the Congo.

We cannot confirm whether Iraq succeeded in acquiring uranium ore and/or yellowcake from these sources. Reports suggest Iraq is shifting from domestic mining and milling of uranium to foreign acquisition. Iraq possesses significant phosphate deposits, from which uranium had been chemically extracted before Operation Desert Storm. Intelligence information on whether nuclear-related phosphate mining and/or processing has been reestablished is inconclusive, however.

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[1] A refined form of natural uranium.

# Annex A

## Iraq's Attempts to Acquire Aluminum Tubes

[This excerpt from a longer view includes INR's position on the African uranium issue]

**INR's Alternative View: Iraq's Attempts to Acquire Aluminum Tubes**

Some of the specialized but dual-use items being sought are, by all indications, bound for Iraq's missile program. Other cases are ambiguous, such as that of a planned magnet production line whose suitability for centrifuge operations remains unknown. Some efforts involve non-controlled industrial material and equipment—including a variety of machine tools—and are troubling because they would help establish the infrastructure for a renewed nuclear program. But such efforts (which began well before the inspectors departed) are not clearly linked to a nuclear end-use. Finally, the claims of Iraqi pursuit of natural uranium in Africa are, in INR's assessment, highly dubious.

**October 25, 2002**

**From: U.S. Southern Command Chief James T. Hill**
**To: Chairman of Joints chiefs of Staff**

**Re: Counter Resistance Strategies - Detainees resistance to interrogation methods**

~~SECRET//NOFORN~~

DEPARTMENT OF DEFENSE
UNITED STATES SOUTHERN COMMAND
OFFICE OF THE COMMANDER
3511 NW 91ST AVENUE
MIAMI, FL 33172-1217

REPLY TO ATTENTION OF

SCCDR

25 October 2002

MEMORANDUM FOR Chairman of the Joint Chiefs of Staff, Washington, DC 20318-9999

SUBJECT: Counter-Resistance Techniques

1. The activities of Joint Task Force 170 have yielded critical intelligence support for forces in combat, combatant commanders, and other intelligence/law enforcement entities prosecuting the War on Terrorism. However, despite our best efforts, some detainees have tenaciously resisted our current interrogation methods. Our respective staffs, the Office of the Secretary of Defense, and Joint Task Force 170 have been trying to identify counter-resistant techniques that we can lawfully employ.

2. I am forwarding Joint Task Force 170's proposed counter-resistance techniques. I believe the first two categories of techniques are legal and humane. I am uncertain whether all the techniques in the third category are legal under US law, given the absence of judicial interpretation of the US torture statute. I am particularly troubled by the use of implied or expressed threats of death of the detainee or his family. However, I desire to have as many options as possible at my disposal and therefore request that Department of Defense and Department of Justice lawyers review the third category of techniques.

3. As part of any review of Joint Task Force 170's proposed strategy, I welcome any suggested interrogation methods that others may propose. I believe we should provide our interrogators with as many legally permissible tools as possible.

4. Although I am cognizant of the important policy ramifications of some of these proposed techniques, I firmly believe that we must quickly provide Joint Task Force 170 counter-resistance techniques to maximize the value of our intelligence collection mission.

James T. Hill
General, US Army
Commander

Encls

1. JTF 170 CDR Memo dtd 11 October, 2002
2. JTF 170 SJA Memo dtd 11 October, 2002
3. JTF 170 J-2 Memo dtd 11 October, 2002

UNCLASSIFIED

Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

~~SECRET//NOFORN~~

October 11, 2002

From: Commander Joint Task Force 170, Major General Michael Dunlavey
To: Commander, United States Southern Command

Re: Counter Resistance Strategies and interrogation techniques used at Guantanamo Bay.

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF 170-CG

11 October 2002

MEMORANDUM FOR Commander, United States Southern Command, 3511 NW 91st Avenue, Miami, Florida 33172-1217

SUBJECT: Counter-Resistance Strategies

1. Request that you approve the interrogation techniques delineated in the enclosed Counter-Resistance Strategies memorandum. I have reviewed this memorandum and the legal review provided to me by the JTF-170 Staff Judge Advocate and concur with the legal analysis provided.

2. I am fully aware of the techniques currently employed to gain valuable intelligence in support of the Global War on Terrorism. Although these techniques have resulted in significant exploitable intelligence, the same methods have become less effective over time. I believe the methods and techniques delineated in the accompanying J-2 memorandum will enhance our efforts to extract additional information. Based on the analysis provided by the JTF-170 SJA, I have concluded that these techniques do not violate U.S. or international laws.

3. My point of contact for this issue is LTC Jerald Phifer at DSN 660-3476.

MICHAEL B. DUNLAVEY
Major General, USA
Commanding

2 Encls
1. JTF 170-J2 Memo, 11 Oct 02
2. JTF 170-SJA Memo, 11 Oct 02

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF 170-SJA

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJ: Legal Review of Aggressive Interrogation Techniques

1. I have reviewed the memorandum on Counter-Resistance Strategies, dated 11 Oct 02, and agree that the proposed strategies do not violate applicable federal law. Attached is a more detailed legal analysis that addresses the proposal.

2. I recommend that interrogators be properly trained in the use of the approved methods of interrogation, and that interrogations involving category II and III methods undergo a legal review prior to their commencement.

3. This matter is forwarded to you for your recommendation and action.

DIANE E. BEAVER
LTC, USA
Staff Judge Advocate

2 Encls
1. JTF 170-J2 Memo, 11 Oct 02
2. JTF 170-SJA Memo, 11 Oct 02

~~UNCLASSIFIED~~
~~SECRET//NOFORN~~

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF-J2

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJECT: Request for Approval of Counter-Resistance Strategies

1. ~~(S//NF)~~ PROBLEM: The current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter advanced resistance.

2. ~~(S//NF)~~ Request approval for use of the following interrogation plan.

a. Category I techniques. During the initial category of interrogation the detainee should be provided a chair and the environment should be generally comfortable. The format of the interrogation is the direct approach. The use of rewards like cookies or cigarettes may be helpful. If the detainee is determined by the interrogator to be non-uncooperative, the interrogator may use the following techniques.

(1) Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems)

(2) Techniques of deception:

(a) Multiple interrogator techniques.

(b) Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees.

b. Category II techniques. With the permission of the OIC, Interrogation Section, the interrogator may use the following techniques.

(1) The use of stress positions (like standing), for a maximum of four hours.

(2) The use of falsified documents or reports.

(3) Use of the isolation facility for up to 30 days. Request must be made to through the OIC, Interrogation Section, to the Director, Joint Interrogation Group (JIG). Extensions beyond the initial 30 days must be approved by the Commanding General. For selected

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By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

JTF 170-J2
SUBJECT: Request for Approval of Counter-Resistance Strategies

detainees, the OIC, Interrogation Section, will approve all contacts with the detainee, to include medical visits of a non-emergent nature.

(4) Interrogating the detainee in an environment other than the standard interrogation booth.

(5) Deprivation of light and auditory stimuli.

(6) The detainee may also have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.

(7) The use of 20-hour interrogations.

(8) Removal of all comfort items (including religious items).

(9) Switching the detainee from hot rations to MREs.

(10) Removal of clothing.

(11) Forced grooming (shaving of facial hair etc...)

(12) Using detainees individual phobias (such as fear of dogs) to induce stress.

c. Category III techniques. Techniques in this category may be used only by submitting a request through the Director, JIG, for approval by the Commanding General with appropriate legal review and information to Commander, USSOUTHCOM. These techniques are required for a very small percentage of the most uncooperative detainees (less than 3%). The following techniques and other aversive techniques, such as those used in U.S. military interrogation resistance training or by other U.S. government agencies, may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees. Any or these techniques that require more than light grabbing, poking, or pushing, will be administered only by individuals specifically trained in their safe application.

(1) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.

(2) Exposure to cold weather or water (with appropriate medical monitoring).

(3) Use of a wet towel and dripping water to induce the misperception of suffocation.

JTF 170-J2
SUBJECT: Request for Approval of Counter-Resistance Strategies

(4) Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.

3. (U) The POC for this memorandum is the undersigned at x3476.

JERALD PHIFER
LTC, USA
Director, J2

UNCLASSIFIED

~~SECRET/NOFORN~~

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09860

JTF 170-SJA

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

1. ~~(S//NF)~~ (U) ISSUE: To ensure the security of the United States and its Allies, more aggressive interrogation techniques than the ones presently used, such as the methods proposed in the attached recommendation, may be required in order to obtain information from detainees that are resisting interrogation efforts and are suspected of having significant information essential to national security. This legal brief references the recommendations outlined in the JTF-170-J2 memorandum, dated 11 October 2002.

2. ~~(S//NF)~~ (U) FACTS: The detainees currently held at Guantanamo Bay, Cuba (GTMO), are not protected by the Geneva Conventions (GC). Nonetheless, DoD interrogators trained to apply the Geneva Conventions have been using commonly approved methods of interrogation such as rapport building through the direct approach, rewards, the multiple interrogator approach, and the use of deception. However, because detainees have been able to communicate among themselves and debrief each other about their respective interrogations, their interrogation resistance strategies have become more sophisticated. Compounding this problem is the fact that there is no established clear policy for interrogation limits and operations at GTMO, and many interrogators have felt in the past that they could not do anything that could be considered "controversial." In accordance with President Bush's 7 February 2002 directive, the detainees are not Enemy Prisoners of War (EPW). They must be treated humanely and, subject to military necessity, in accordance with the principles of GC.

3. ~~(S//NF)~~ (U) DISCUSSION: The Office of the Secretary of Defense (OSD) has not adopted specific guidelines regarding interrogation techniques for detainee operations at GTMO. While the procedures outlined in, Army FM 34-52 Intelligence Interrogation (28 September 1992), are utilized, they are constrained by, and conform to the GC and applicable international law, and therefore are not binding. Since the detainees are not EPWs, the Geneva Conventions limitations that ordinarily would govern captured enemy personnel interrogations are not binding on U.S. personnel conducting detainee interrogations at GTMO. Consequently, in the absence of specific binding guidance, and in accordance with the President's directive to treat the detainees humanely, we must look to applicable international and domestic law in order to determine the legality of the more aggressive interrogation techniques recommended in the J2 proposal.

a. (U) International Law: Although no international body of law directly applies, the more notable international treaties and relevant law are listed below.

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By Executive Secretary, Office of the Secretary of Defen
By William P. Marriott, CAPT, USN
June 21, 2004

UNCLASSIFIED

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JTF170-SJA
SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

(1) (U) In November of 1994, the United States ratified The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. However, the United States took a reservation to Article 16, which defined cruel, inhumane and degrading treatment or punishment, by instead deferring to the current standard articulated in the 8th Amendment to the United States Constitution. Therefore, the United States is only prohibited from committing those acts that would otherwise be prohibited under the United States Constitutional Amendment against cruel and unusual punishment. The United States ratified the treaty with the understanding that the convention would not be self-executing, that is, that it would not create a private cause of action in U.S. Courts. This convention is the principal U.N. treaty regarding torture and other cruel, inhumane, or degrading treatment.

(2) (U) The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, prohibits inhumane treatment in Article 7, and arbitrary arrest and detention in Article 9. The United States ratified it on the condition that it would not be self-executing, and it took a reservation to Article 7 that we would only be bound to the extent that the United States Constitution prohibits cruel and unusual punishment.

(3) (U) The American Convention on Human Rights forbids inhumane treatment, arbitrary imprisonment, and requires the state to promptly inform detainees of the charges against them, to review their pretrial confinement, and to conduct a trial within a reasonable time. The United States signed the convention on 1 June 1977, but never ratified it.

(4) (U) The Rome Statute established the International Criminal Court and criminalized inhumane treatment, unlawful deportation, and imprisonment. The United States not only failed to ratify the Rome Statute, but also later withdrew from it.

(5) (U) The United Nations' Universal Declaration of Human Rights, prohibits inhumane or degrading punishment, arbitrary arrest, detention, or exile. Although international declarations may provide evidence of customary international law (which is considered binding on all nations even without a treaty), they are not enforceable by themselves.

(6) (U) There is some European case law stemming from the European Court of Human Rights on the issue of torture. The Court ruled on allegations of torture and other forms of inhumane treatment by the British in the Northern Ireland conflict. The British authorities developed practices of interrogation such as forcing detainees to stand for long hours, placing black hoods over their heads, holding the detainees prior to interrogation in a room with continuing loud noise, and depriving them of sleep, food, and water. The European Court concluded that these acts did not rise to the level of torture as defined in the Convention Against Torture, because torture was defined as an aggravated form of cruel, inhuman, or degrading treatment or punishment. However, the Court did find that these techniques constituted cruel, inhumane, and degrading treatment. Nonetheless, and as previously mentioned, not only is the United States not a part of the European Human Rights Court, but as previously stated, it only ratified the definition of cruel, inhuman, and degrading treatment consistent with the U.S. Constitution. See also Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Geor. 2002); Committee Against Torture v. Israel, Supreme Court of Israel, 6 Sep 99, 7 BHRC 31; Ireland v. UK (1978), 2 EHRR 25.

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b. (U) Domestic Law: Although the detainee interrogations are not occurring in the continental United States, U.S. personnel conducting said interrogations are still bound by applicable Federal Law, specifically, the Eighth Amendment of the United States Constitution, 18 U.S.C. § 2340, and for military interrogators, the Uniform Code of Military Justice (UCMJ).

(1) (U) The Eighth Amendment of the United States Constitution provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. There is a lack of Eighth Amendment case law relating in the context of interrogations, as most of the Eighth Amendment litigation in federal court involves either the death penalty, or 42 U.S.C. § 1983 actions from inmates based on prison conditions. The Eighth Amendment applies as to whether or not torture or inhumane treatment has occurred under the federal torture statute.[1]

(a) (U) A principal case in the confinement context that is instructive regarding Eighth Amendment analysis (which is relevant because the United States adopted the Convention Against Torture, Cruel, Inhumane and Degrading Treatment, it did so deferring to the Eighth Amendment of the United States Constitution) and conditions of confinement if a U.S. court were to examine the issue is Hudson v. McMillian, 503 U.S. 1 (1992). The issue in Hudson stemmed from a 42 U.S.C. § 1983 action alleging that a prison inmate suffered minor bruises, facial swelling, loosened teeth, and a cracked dental plate resulting from a beating by prison guards while he was cuffed and shackled. In this case the Court held that there was no governmental interest in beating an inmate in such a manner. The Court further ruled that the use of excessive physical force against a prisoner might constitute cruel and unusual punishment, even though the inmate does not suffer serious injury.

(b) (U) In Hudson, the Court relied on Whitley v. Albers, 475 U.S. 312 (1986), as the seminal case that establishes whether a constitutional violation has occurred. The Court stated that the extent of the injury suffered by an inmate is only one of the factors to be considered, but that there is no significant injury requirement in order to establish an Eighth Amendment violation, and that the absence of serious injury is relevant to, but does not end, the Eighth Amendment inquiry. The Court based its decision on the "...settled rule that the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Whitley at 319, *quoting* Ingraham v. Wright, 430 U.S. 651, 670 (1977). The Hudson Court then held that in the excessive force or conditions of confinement context, the Eighth Amendment violation test delineated by the Supreme Court in Hudson is that when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated, whether or not significant injury is evident. The extent of injury suffered by an inmate is one factor that may suggest whether the use of force could plausibly have been thought necessary in a particular situation, but the question of whether the measure taken inflicted unnecessary and wanton pain and suffering, ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very (emphasis added) purpose of causing harm. If so, the Eighth Amendment claim will prevail.

[1] Notwithstanding the argument that U.S. personnel are bound by the Constitution, the detainees confined at GTMO have no jurisdictional standing to bring a section 1983 action alleging an Eighth Amendment violation in U.S. Federal Court.

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(c) (U) At the District Court level, the typical conditions-of-confinement claims involve a disturbance of the inmate's physical comfort, such as sleep deprivation or loud noise. The Eighth Circuit ruled in Singh v. Holcomb, 1992 U.S. App. LEXIS 24790, that an allegation by an inmate that he was constantly deprived of sleep which resulted in emotional distress, loss of memory, headaches, and poor concentration, did not show either the extreme deprivation level, or the officials' culpable state of mind required to fulfill the objective component of an Eighth Amendment conditions-of-confinement claim.

(d) (U) In another sleep deprivation case alleging an Eighth Amendment violation, the Eighth Circuit established a totality of the circumstances test, and stated that if a particular condition of detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. In Ferguson v. Cape Girardeau County, 88 F.3d 647 (8th Cir. 1996), the complainant was confined to a 5-1/2 by 5-1/2 foot cell without a toilet or sink, and was forced to sleep on a mat on the floor under bright lights that were on twenty-four hours a day. His Eighth Amendment claim was not successful because he was able to sleep at some point, and because he was kept under those conditions due to a concern for his health, as well as the perceived danger that he presented. This totality of the circumstances test has also been adopted by the Ninth Circuit. In Green v. CSO Strack, 1995 U.S. App. LEXIS 14451, the Court held that threats of bodily injury are insufficient to state a claim under the Eighth Amendment, and that sleep deprivation did not rise to a constitutional violation where the prisoner failed to present evidence that he either lost sleep or was otherwise harmed.

(e) (U) Ultimately, an Eighth Amendment analysis is based primarily on whether the government had a good faith legitimate governmental interest, and did not act maliciously and sadistically for the very purpose of causing harm.

(2) (U) The torture statute (18 U.S.C. § 2340) is the United States' codification of the signed and ratified provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and pursuant to subsection 2340B, does not create any substantive or procedural rights enforceable by law by any party in any civil proceeding.

(a) (U) The statute provides that "whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."

(b) (U) Torture is defined as "an act committed by a person acting under color of law *specifically intended* (emphasis added) to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within his custody or physical control." The statute defines "severe mental pain or suffering" as "the *prolonged mental harm caused by or resulting* (emphasis added) from the intentional infliction or threatened infliction of severe physical pain or suffering; or the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses of the personality; or the threat of imminent death; or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality."

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(c) (U) Case law in the context of the federal torture statute and interrogations is also lacking, as the majority of the case law involving torture relates to either the illegality of brutal tactics used by the police to obtain confessions (in which the Court simply states that these confessions will be deemed as involuntary for the purposes of admissibility and due process, but does not actually address torture or the Eighth Amendment), or the Alien Torts Claim Act, in which federal courts have defined that certain uses of force (such as kidnapping, beating and raping of a man with the consent or acquiescence of a public official, See Ortiz v. Gramajo, 886 F.Supp. 162 (D. Mass. 1995)) constituted torture. However, no case law on point within the context of 18 USC 2340.

(3) (U) Finally, U.S. military personnel are subject to the Uniform Code of Military Justice. The punitive articles that could potentially be violated depending on the circumstances and results of an interrogation are: Article 93 (cruelty and maltreatment), Article 118 (murder), Article 119 (manslaughter), Article 124 (maiming), Article 128 (assault), Article 134 (communicating a threat, and negligent homicide), and the inchoate offenses of attempt (Article 80), conspiracy (Article 81), accessory after the fact (Article 78), and solicitation (Article 82). Article 128 is the article most likely to be violated because a simple assault can be consummated by an unlawful demonstration of violence which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm, and a specific intent to actually inflict bodily harm is not required.

4. ~~(S//NF)~~ ANALYSIS: The counter-resistance techniques proposed in the JTF-170-J2 memorandum are lawful because they do not violate the Eighth Amendment to the United States Constitution or the federal torture statute as explained below. An international law analysis is not required for the current proposal because the Geneva Conventions do not apply to these detainees since they are not EPWs.

(a) ~~(S//NF)~~ Based on the Supreme Court framework utilized to assess whether a public official has violated the Eighth Amendment, so long as the force used could plausibly have been thought necessary in a particular situation to achieve a legitimate governmental objective, and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing harm, the proposed techniques are likely to pass constitutional muster. The federal torture statute will not be violated so long as any of the proposed strategies are not specifically intended to cause severe physical pain or suffering or prolonged mental harm. Assuming that severe physical pain is not inflicted, absent any evidence that any of these strategies will in fact cause prolonged and long lasting mental harm, the proposed methods will not violate the statute.

(b) ~~(S//NF)~~ Regarding the Uniform Code of Military Justice, the proposal to grab, poke in the chest, push lightly, and place a wet towel or hood over the detainee's head would constitute a per se violation of Article 128 (Assault). Threatening a detainee with death may also constitute a violation of Article 128, or also Article 134 (communicating a threat). It would be advisable to have permission or immunity in advance from the convening authority, for military members utilizing these methods.

(c) ~~(S//NF)~~ Specifically, with regard to Category I techniques, the use of mild and fear related approaches such as yelling at the detainee is not illegal because in order to communicate a threat, there must also exist an intent to injure. Yelling at the detainee is legal so long as the yelling is not done with the intent to cause severe physical damage or prolonged mental harm. Techniques of deception such as multiple interrogator techniques, and deception regarding interrogator identity are all permissible methods of interrogation, since there is no legal requirement to be truthful while conducting an interrogation.

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(d) ~~(S//NF)~~ With regard to Category II methods, the use of stress positions such as the proposed standing for four hours, the use of isolation for up to thirty days, and interrogating the detainee in an environment other than the standard interrogation booth are all legally permissible so long as no severe physical pain is inflicted and prolonged mental harm intended, and because there is a legitimate governmental objective in obtaining the information necessary that the high value detainees on which these methods would be utilized possess, for the protection of the national security of the United States, its citizens, and allies. Furthermore, these methods would not be utilized for the "very malicious and sadistic purpose of causing harm," and absent medical evidence to the contrary, there is no evidence that prolonged mental harm would result from the use of these strategies. The use of falsified documents is legally permissible because interrogators may use deception to achieve their purpose.

(e) ~~(S//NF)~~ The deprivation of light and auditory stimuli, the placement of a hood over the detainee's head during transportation and questioning, and the use of 20 hour interrogations are all legally permissible so long as there is an important governmental objective, and it is not done for the purpose of causing harm or with the intent to cause prolonged mental suffering. There is no legal requirement that detainees must receive four hours of sleep per night, but if a U.S. Court ever had to rule on this procedure, in order to pass Eighth Amendment scrutiny, and as a cautionary measure, they should receive some amount of sleep so that no severe physical or mental harm will result. Removal of comfort items is permissible because there is no legal requirement to provide comfort items. The requirement is to provide adequate food, water, shelter, and medical care. The issue of removing published religious items or materials would be relevant if these were United States citizens with a First Amendment right. Such is not the case with the detainees. Forced grooming and removal of clothing are not illegal, so long as it is not done to punish or cause harm, as there is a legitimate governmental objective to obtain information, maintain health standards in the camp and protect both the detainees and the guards. There is no illegality in removing hot meals because there is no specific requirement to provide hot meals, only adequate food. The use of the detainee's phobias is equally permissible.

(f) ~~(S//NF)~~ With respect to the Category III advanced counter-resistance strategies, the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent is not illegal for the same aforementioned reasons that there is a compelling governmental interest and it is not done intentionally to cause prolonged harm. However, caution should be utilized with this technique because the torture statute specifically mentions making death threats as an example of inflicting mental pain and suffering. Exposure to cold weather or water is permissible with appropriate medical monitoring. The use of a wet towel to induce the misperception of suffocation would also be permissible if not done with the specific intent to cause prolonged mental harm, and absent medical evidence that it would. Caution should be exercised with this method, as foreign courts have already advised about the potential mental harm that this method may cause. The use of physical contact with the detainee, such as pushing and poking will technically constitute an assault under Article 128, UCMJ.

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5. ~~(S//NF)~~ RECOMMENDATION: I recommend that the proposed methods of interrogation be approved, and that the interrogators be properly trained in the use of the approved methods of interrogation. Since the law requires examination of all facts under a totality of circumstances test, I further recommend that all proposed interrogations involving category II and III methods must undergo a legal, medical, behavioral science, and intelligence review prior to their commencement.

6. (U) POC: Captain Michael Bordera, x3536.

DIANE E. BEAVER
LTC, USA
Staff Judge Advocate

~~SECRET//NOFORN~~



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**November 26, 2002**

**From: Chairman Committee of Armed Services, Carl Levin**

**To: General Counsel Department of Defense, William J. Haynes II.**

**RE: Designation of Enemy Combatants**

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

NOV 2 6 2002

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your and Senator Feingold's September 5, 2002 letter concerning the designation of enemy combatants in the ongoing war against terrorism. Secretary Rumsfeld has asked me to answer your questions on behalf of the Department of Defense ("DoD"). I am sending a substantially identical letter to Senator Feingold.

Your letter addresses important issues that we take very seriously. Detaining enemy combatants is critical to winning any war, and Presidents have detained enemy combatants in every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. We are careful, however, to ensure that detainees are indeed enemy combatants, and we treat them humanely. In all wars, the fundamental purpose of our detention of enemy combatants remains the same: to prevent hostile forces from returning to assist our enemies and again posing a threat to the United States. As in other conflicts, our purpose in detention is not to punish, but to protect.

Where you submitted identical questions to both the Department of Justice ("DOJ") and DoD, we have sought to avoid duplication. DoD's responses to your questions are as follows:

1. *What is the operative definition of "enemy combatant" and what are the criteria used to determine whether a United States citizen will be designated an enemy combatant? If that definition is contained in a document, please provide a copy of that document and identify the source of the document as well as the agency or person responsible for maintaining the document. Please describe the basis for the definition and the process followed to arrive at the definition.*

An "enemy combatant" is an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict. In the current conflict with al Qaida and the Taliban, for example, the term includes a member, agent, or associate of al Qaida or the Taliban. In applying this definition, we note our consistency with the observation of the Supreme Court of the United States in *Ex parte Quirin*, 317 U.S. 1

(1942): "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war." *Id.* at 37--38. There are no criteria for designating enemy combatants that are unique to United States citizens.

Please refer to DOJ's responses to questions 1 and 3 for further discussion of these issues.

2. *What is the process for designating a person an "enemy combatant"? What agency or individual has the responsibility to make such a designation? Is the ultimate authority to designate a United States citizen as an enemy combatant reserved for the President? If not, who else holds that authority? What role does the Department of Defense play in this process? Please describe the process that was used to designate Jose Padilla and Yaser Esam Hamdi as enemy combatants.*

The determination of enemy combatant status has traditionally resided with the military commander who is authorized to engage the enemy with deadly force. In this regard, the task ultimately falls within the President's constitutional responsibility as Commander in Chief to identify which forces and persons to engage or capture and detain during an armed conflict. Of course, there is no requirement that the President make such determinations personally, and in the vast majority of cases he does not do so. Rather, consistent with longstanding historical practice and applicable rules of engagement, the task is normally a function of the military command structure.

In the current conflict, military personnel ordinarily make enemy combatant determinations during combat operations, under the combatant commander's direction. As was the case with Mr. Hamdi, such determinations normally would not take into account the enemy combatant's citizenship. Under the laws of war and federal court precedent, enemy combatants who are United States citizens are subject to detention to the same extent as non-citizens.

With respect to individuals captured in the United States, to date DoD has detained only Abdullah al Muhajir, also known as Jose Padilla. The President, as Commander in Chief, determined that Mr. Padilla is an enemy combatant.

As the United States is in active habeas corpus litigation concerning the detention of Messrs. Hamdi and Padilla, it is more appropriate for DOJ to provide information about those cases. Accordingly, I refer you to the response from DOJ for additional explanation.

3. *Do the criteria for determining enemy combatant status vary depending upon whether an individual is a citizen of the United States? Do the criteria vary if*

*the person is taken into custody outside the United States? Do they vary if the person is taken into custody on the battlefield?*

Please see the DOJ response to this question, as well as my response to questions 1 and 2.

4. *What rights does a United States citizen designated as an enemy combatant have to challenge that designation other than the right to habeas corpus review? What is the scope of the detainee's right to counsel if the detainee seeks to challenge the enemy combatant designation?*

In this armed conflict against the al Qaida and the Taliban, a United States citizen designated as an enemy combatant may challenge his detention only by a petition for habeas corpus. Enemy combatants have no *right* to counsel to challenge their detention. During World War II, the United States detained hundreds of thousands of prisoners of war in the United States (some of whom were U.S. citizens). Providing access to counsel as a matter of right in such circumstances would set a potentially unsustainable precedent due to sheer numbers alone.

More importantly, giving enemy combatants a right of access to counsel for the purpose of challenging detention could threaten national security by interfering with active military operations. Collecting intelligence from detained enemy combatants during war provides critical information about the enemy's capabilities, operations, and plans. Providing such access to counsel could thwart our ability to collect this information and could imperil efforts to prevent further terrorist attacks.

Nevertheless, enemy combatants would of course receive access to counsel if they were made subject to criminal charges. As you may know, the rules of procedure for military commissions provide defendants with access to counsel at the expense of the government. *See* Military Commission Order No. 1, § 4(C) (Mar. 21, 2002).

Moreover, DoD reviews the status of all enemy combatants on a case-by-case basis to determine whether they should continue to be detained. Indeed, since we first captured or came to control detainees in Afghanistan, we have released many thousands, and we recently released additional detainees from the United States Naval Base in Guantanamo Bay, Cuba.

5. *What are the time limits on the government's authority to detain United States citizens designated as enemy combatants? The government has argued that "the authority to detain enemy combatants in time of war . . . is well established." Under the current circumstances, who determines when this time has expired and how will that determination be made?*

The United States may detain enemy combatants throughout the conflict (and thereafter if they are convicted of war crimes or other criminal offenses). Detaining enemy combatants during a conflict removes them from the battlefield, prevents them from waging war against the United States, and protects them from harm. It also provides us an opportunity to gather intelligence that may be vital to preventing further attacks. This detention is distinct from incarceration as punishment for violations of the laws of war or other crimes.

Military commanders may release enemy combatants before the conflict ends. Reasons for such a decision include determinations that enemy combatants no longer pose a threat, that they possess no further intelligence value, and that they have not committed any crimes. A "parole" or other agreement could prohibit these enemy combatants from fighting against the United States and subject them again to detention if they violate the agreement.

The government's political (as opposed to judicial) branches decide when hostilities have ended.

6. *According to published reports, the Administration is considering establishing a committee to determine whether United States citizens should be designated as enemy combatants. What is the timetable for establishing such a committee? What is the membership of the committee expected to be? What is the legal authority and basis for the use of such a committee? What procedures are being established to guide this committee?*

Military commanders normally determine enemy combatant status. The Administration has no plans to entrust this responsibility to a committee. Due to the gravity of such determinations, however, and due to the complexities posed by this war and our adversaries, we continually seek better ways to coordinate efforts and to facilitate accurate, timely communication of relevant information.

7. *Are U.S. citizens other than Hamdi and Padilla being held as enemy combatants? If so, how many and who are they? In each case, please describe the process that was used to designate each person as an enemy combatant. What are the Administration's procedures for notifying Congress and the American people that someone has been designated an enemy combatant?*

As you know, John Walker, evidently a United States citizen, was captured in Afghanistan and eventually detained by the United States Armed Forces as an enemy combatant. He was, of course, subsequently indicted on Federal criminal charges, transferred to the custody of Federal law enforcement officials, and convicted. He is currently serving a criminal sentence in a Federal penitentiary.

I am not aware that the United States is detaining any United States citizens other than Messrs. Hamdi and Padilla solely on the basis of their status as enemy combatants. The Administration is keeping Congress and the public appropriately informed with respect to the Hamdi and Padilla cases. We will continue to keep Congress appropriately informed with respect to enemy combatants who are United States citizens, should more such cases arise.

*8. Has the Defense Department made any related changes to existing U.S. military regulations implementing the Geneva Conventions of 1949?*

No. DoD has not changed its policies regarding treatment of individuals who qualify for a particular status under the Geneva Conventions of 1949.

Capturing and detaining a United States citizen, or any other human being, is not an activity DoD takes lightly. As in other armed conflicts in which our Nation has been engaged, the detention of enemy combatants serves a vitally important protective function. Equally important, however, the deliberate, conscientious, and humane manner in which we designate and detain enemy combatants reflects our values and character as a Nation. We are committed to defending the United States in accordance with our constitutional responsibilities, while preserving the constitutional rights of United States citizens. I believe that our actions are fully consistent with both commitments.

Sincerely,

William J. Haynes II

cc:
The Honorable John Ashcroft,
Attorney General of the United States
The Honorable John W. Warner, Ranking Member
Committee on Armed Services

**November 12, 2002**

**Memorandum From: Under Secretary for International Affairs**
**To: Secretary of the Treasury, Paul O'Neill**

**RE: Arab-Israeli Peace Roadmap - Palestinian Authority Finances**

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

UNDER SECRETARY

November 12, 2002

**BRIEFING**

**MEMORANDUM FOR SECRETARY O'NEILL**

**FROM:** John B. Taylor
Under Secretary for International Affairs

**SUBJECT:** NSC Principals' Meeting on the Middle East

## Summary and Key Points

You will join other NSC principals in a meeting with President Bush to discuss Middle East policy on November 15. The principals will discuss (1) options for advancing the President's agenda for the Israeli-Palestinian conflict over the next three months, (2) the desirability of convening a peace conference or sending a special envoy to the region, and (3) two operational issues: (a) lack of progress on Palestinian security reforms and (b) implementation of a US-proposed plan to encourage the transfer of PA revenues being withheld by Israel.[1] Treasury has played a significant role in developing the US proposal (attached) for revenue transfers. You may wish to make the following points regarding revenue transfers:

- The US-proposed revenue transfer plan is an important part of the overall roadmap. It supports the efforts of the PA Finance Minister Fayyad (one of the strongest reformers in the PA) to strengthen financial accountability and transparency in PA finances.
- If implemented quickly, the mechanism can be a useful vehicle for building confidence between the Israelis and Palestinians.
- If revenue transfers don't resume, the result could be a worsening of the humanitarian situation, increasing civil unrest, and a deterioration of the security environment.

## Background

**1. Advancing the President's Agenda:** Principals will be asked to consider options for next steps on the Quartet group's (US, Russia, EU and UN) roadmap for peace between Israel and the Palestinians. The "roadmap" is a series of steps that Israel and the Palestinians would take over three years in order to implement the President's vision of a two-state solution to the Israeli-Palestinian conflict. The State Department is in the process of finalizing the roadmap by incorporating comments from key allies, Israel and the Palestinians. On November 13, Deputies discussed three options for how to deal with the roadmap over the next three months given recent developments in the region, in particular the announcement of new Israeli elections:

[1] Israeli authorities collect Palestinian customs revenues on behalf of the PA. After the start of the intifada in September 2000, Israel suspended the transfer of these revenues to the PA. The stock of withheld revenues stands at approximately $850 million.

i. Put the roadmap on hold, i.e., delay finalizing it or making it public;
ii. Finalize the roadmap and exert pressure on Israel and the Palestinians to implement it quickly;
iii. Finalize the roadmap but don't insist on immediate action given domestic political uncertainties in Israel.

Deputies felt that putting the roadmap on hold could undermine the President's credibility with key allies (all of whom are looking to the US for leadership on this issue) and is therefore not a desirable option. Finalizing the roadmap and exerting pressure to implement it would help maintain momentum on the initiative but could also lead to the roadmap's failure if the parties involved refuse to respond positively. Finalizing the roadmap but taking a "wait and see" approach on implementation would also help maintain momentum and would preserve our options when parties in the region signal a willingness to reengage on the "roadmap." Under this approach, the US might be in a better position to exert greater pressure on the parties involved once their domestic political landscape becomes clearer. If a wait and see approach is adopted, the US would still need to exert some pressure on the parties involved so that progress made to date is not lost.

**2. Conference / Special Envoy.** The State Department has proposed the idea of a "peace conference" sometime in 2003. Alternatively (or in addition to) the US could appoint a "Special Envoy" to the region to continue dialogue and engage the parties on the "roadmap." Both options appear to fall under the category of "wait and see."

**3. Operational Issues.** The Principals will be asked to consider two operational issues, revenue transfers and security reforms. These issues are linked. Israel collects customs revenues on goods entering the West Bank and Gaza through Israeli checkpoints. Under the 1995 Paris Protocol, Israel has been transferring these withheld revenues to the PA on a monthly basis. During his meeting with Prime Minister Sharon in mid-October, President Bush stressed the importance of Israel resuming revenue transfers to Palestinian reforms (transfers were suspended shortly after the start of the intifada in September 2000). Today, the stock of these withheld revenues totals about $850 million. If the transfers do not resume quickly, the PA would be unable to pay public sector salaries, fund health or education programs (thereby deepening the already grave humanitarian situation in the West Bank and Gaza), or credibly promote civil reforms. Since July, PA Finance Minister Fayyad has implemented reforms to capture extra-budgetary revenues into a single treasury account (STA), pay security services through bank transfers (not in cash), and required an integrated line-item budget for each spending ministry or office (including Arafat's office) starting with the 2003 budget. By continuing his reforms, Fayyad hopes to gain control over all PA treasury functions. This in turn would reduce the possibility of official PA money being used for terrorist activities.

**ATTACHMENTS:** Summary of the Quartet's Roadmap
Proposed Revenue Transfer Mechanism

**CC:** Deputy Secretary Dam

Security Council
4613th Meeting* (AM)

# QUARTET'S ROADMAP FOR MIDDLE EAST PEACE

A new roadmap for peace in the Middle East must not only be based on performance, but also founded on hope, Terje Roed-Larsen, Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General, told the Security Council this morning.

Briefing the Council on the situation in that region, including the Palestinian question, he said the Quartet principals and their envoys would flesh out the roadmap in the coming days. On Tuesday, 17 September, the Quartet (United Nations, Russian Federation, United States, European Union) held three meetings, including one with five Arab Foreign Ministers, and one with Israeli and Palestinian representatives. The meetings focused on the humanitarian situation, security issues, institutional reform, and the political process, all of which were closely linked.

Mr. Roed-Larsen said members of the Quartet had expressed great concern about the humanitarian situation. Half the Palestinian population now depended on food hand-outs from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) or the World Food Programme (WFP), while malnutrition and water-borne diseases were spreading. Members of the Quartet had underlined to the Israeli delegation the problems of access and movement within the occupied territory and how closures adversely affected Palestinian security training, humanitarian delivery and the implementation of reform. The Quartet pointed out that progress on reform had been uneven at best, although there had been promising signs.

He said the Secretary-General had told the parties to the conflict that in spite of high-level assurances of increased Israeli cooperation with humanitarian agencies, officials of those agencies were reporting only marginal improvements on the ground. The bottom line was that there could be no real progress on the humanitarian front if Israel did not alter its security system, which, while based on entirely legitimate and understandable concerns, was hurting an increasingly significant portion of the Palestinian population.

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*The 4608th, 4609th, 4610th and 4612th meetings were closed.

Members of the Quartet had agreed on a three-phase plan of action for achieving a two-State solution within three years, he said. Since there was such a lack of confidence between the parties, forward movement would be monitored and assessed by a third-party mechanism to be established by the Quartet. An important step could be a declaration of statehood with provisional borders, should the Palestinians opt for that.

Israel must take immediate steps to allow far greater freedom of movement for Palestinians and goods, withdraw from self-rule areas reoccupied since October 2000, end targeted killings and freeze settlement activity, he emphasized. That would be followed by permanent status negotiations and an international conference that would address all tracks of the peace process. It was essential that both parties take action on all subjects — humanitarian, security, reform and the political process.

Turning to the recent escalation in the conflict, Mr. Roed-Larsen said the upsurge of violence in Israel, the West Bank and Gaza included the bombing of a Palestinian school, and Israeli Defence Force (IDF) operations across the West Bank and Gaza. Troops had fired into a crowd of schoolchildren, and there had been two suicide bombings against Israelis. In recent weeks, there had also been widespread arrests by the IDF, assassinations and a tightened regime of closures and curfews.

He said that in the month leading up to 17 September, 56 Palestinians had been killed by Israelis and five Israelis by Palestinians. Nevertheless, there had been a long period without suicide bombings, marked by sustained introspection on the Palestinian side. Today, however, Palestinian Authority President Yasser Arafat's offices were once again under siege. While reform remained important, with Palestinian legislators awaiting a new Cabinet and many calling for the appointment of a Prime Minister, the security situation of recent days continued to undermine the prospects.

Concerning southern Lebanon, he said a four-month period of tense stability had been shattered on 29 August by a Hezbollah attack on IDF positions in the Shaba farms area. Tensions had also been raised by a looming water crisis. Lebanon had been urged to provide a detailed report on water projects, but no documentation had been received.

Concluding his briefing, Mr. Roed-Larsen stressed the vital importance of improved performance in security and humanitarian delivery by both Israelis and Palestinians. It would be impossible to sustain progress in either field without parallel movement in the political area, he added.

Following the briefing, the Council went into closed consultations on the Middle East.

The formal meeting, which began at 11:16 a.m., adjourned at 11:35 a.m.

## PROPOSED MONITORING MECHANISM FOR THE TRANSFER OF REVENUES

The U.S. Government has developed a draft mechanism to monitor the use of transferred revenues from the Government of Israel (GOI) to the Palestinian Authority (PA), which will meet the Palestinians' need for a reasonably financed budget and maintain momentum on Palestinian reforms, a key concern of the international community. The draft monitoring mechanism ("Mechanism") will result in a resumption of regular monthly transfers of tax revenues to the Palestinian Ministry of Finance, agreement on a way forward to settle the outstanding stock of withheld revenues, and regular briefings on Palestinian expenditures.

The U.S., Israel and the Palestinians have concerns that must be addressed through this Mechanism. Among these are U.S. concerns about maintaining momentum on Palestinian reforms broadly and alleviating the humanitarian and economic crisis in the West Bank and Gaza; Israeli concerns about how transferred revenues are used by the PA; and the Palestinians' concern about being able to finance a development budget that meets basic development needs in the West Bank and Gaza. These three primary concerns are addressed through key elements of the proposed Mechanism:

1. The PA's **budget exercise** will be related to **reforms** underway by the PA that are being monitored by the Quartet's Task Force on Palestinian Reform.
2. In an initial meeting, the US, Israel and the PA will review the **budgetary framework** and its links to **revenue transfers**. Israel will agree to an immediate resumption of monthly clearance meetings and revenue transfers, and a schedule for settling the outstanding stock of withheld revenues.
3. In subsequent meetings, US, Israeli and Palestinian officials will review the previous month's expenditures, assess reform progress and preview the coming month's budgetary framework, with a view to ensuring that the above mentioned concerns are adequately addressed.
4. **Reforms to strengthen financial accountability** are being regularly monitored by the Quartet's Task Force and other donors, including the World Bank and IMF. These reports will periodically be shared with Israel.
5. The U.S. is working with the PA and the Palestinian Monetary Authority to provide **technical advisers** specialized in terrorist financing and anti-money laundering to assist in establishing a Financial Intelligence Unit, an anti-money laundering law, and other measures to further strengthen financial accountability.

These elements together -- the detailed budget framework, regular meetings to review expenditures, U.S.-led monitoring of financial accountability reforms, and U.S. assistance in strengthening institutional capacities -- offer the best chance for satisfying the concerns of all parties involved. The proposed Mechanism will help instill confidence in the GOI that PA budgetary resources are being properly used, ensure that the Palestinians can fully finance their budget, and support the U.S. objective of strengthening and verifying implementation of the reform program.

## MONITORING MECHANISM FOR THE TRANSFER OF REVENUES

*In an initial meeting, the US, Israel and the PA will review the budgetary framework and its links to revenue transfers. Israel will agree to an immediate resumption of monthly clearance meetings and revenue transfers, and a schedule for settling the outstanding stock of withheld revenues.*

- The PA will present its "2003 Budgetary Framework," a breakdown of the budget with revenue (including domestic and expected clearance), current expenditures (including wage and non-wage expenditures), arrears, capital expenditures, expected external financing, and levels of employment. Israeli officials will have the opportunity to ask questions for clarification, if needed, about the framework.
- Israel will present its concerns about financial accountability to the PA, possibly as a "list" of specific concerns.
- The PA will review the "list" and respond to those concerns it is able to address, while committing itself to addressing those concerns that have not yet been addressed (the US should resist any preconditions by Israel on the transfers based on these concerns unless the concerns are fundamental to accountability).
- Israel will commit to a schedule of transfers in the form of a Memorandum and stating something along the lines of "Israel agrees to transfer withheld revenues to the PA MoF by Noon on the last Thursday of every month."
- The two sides will agree to meet regularly before the transfer takes place, preferably one week in advance.

*In subsequent meetings, US, Israeli and Palestinian officials will review the previous month's expenditures, assess reform progress and preview the coming month's budgetary framework, with a view to ensuring that the above mentioned concerns are adequately addressed.*

- According to an agreed schedule of regular meetings, the PA will present the previous month's expenditures. The PA's monthly "Budgetary Outcome" report will be discussed with the Israelis, who have an opportunity to ask questions about specific expenditures, in aggregate.
- The "Budgetary Outcome" report, depending on the PA's comfort level, could be a breakdown by ministry and office, including details about the level of employment, operating expenditures, non-wage transfers, capital investments, arrears, wage and non-wage expenditures.
- The PA will present an update on reforms he has implemented over the previous month and describe any obstacles to implementation he is facing. The PA will preview implementation plans for additional reforms (including those the Israelis present at the initial meeting).
- Israel will have the opportunity to comment on the reform process and present its views on how reforms can proceed (including steps Israel can take to support reforms).
- The PA will preview the coming month's budgetary framework, in the same level of details as above. Israel will have the opportunity to ask questions about the framework.

*Reforms to strengthen financial accountability are being regularly monitored by the Quartet's Task Force and other donors, including the World Bank and IMF. These reports will periodically be shared with Israel.*

- Depending on the concerns Israeli raises about financial accountability, the US (possibly in consultation with the PA) will share with the GOI any relevant reports by the Task Force or its members that the US believes will help satisfy Israeli concerns.

*The U.S. is working with the PA and the Palestinian Monetary Authority to provide technical advisers specialized in terrorist financing and anti-money laundering to assist in establishing a Financial Intelligence Unit, an anti-money laundering law, and other measures to further strengthen financial accountability.*

- Progress on US-financed reforms (whether through third-party contractors or technical advisers) will be shared with both sides as needed.

DATE: November 14, 2002

TO: Secretary O'Neill

FROM: Under Secretary Taylor

RE: NSC Principals Meeting with POTUS on the Middle East

Drafted by: Adnan Kifayat / ISM

Cleared by: Larry McDonald / Director, ISM
David Loevinger / DAS, Middle East

December 2, 2002

Department of Defense memorandum

FROM: Defense Department's General Counsel, William J. Haynes II
TO: Secretary of Defense Donald Rumsfeld

UNCLASSIFIED

-C.
-PD.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

2002 DEC -2 AM 11:03

OFFICE OF THE
SECRETARY OF DEFENSE

GENERAL COUNSEL

# ACTION MEMO

November 27, 2002 (1:00 PM)

DEPSEC_____

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel

SUBJECT: Counter-Resistance Techniques

- The Commander of USSOUTHCOM has forwarded a request by the Commander of Joint Task Force 170 (now JTF GTMO) for approval of counter-resistance techniques to aid in the interrogation of detainees at Guantanamo Bay (Tab A).

- The request contains three categories of counter-resistance techniques, with the first category the least aggressive and the third category the most aggressive (Tab B).

- I have discussed this with the Deputy, Doug Feith and General Myers. I believe that all join in my recommendation that, as a matter of policy, you authorize the Commander of USSOUTHCOM to employ, in his discretion, only Categories I and II and the fourth technique listed in Category III ("Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing").

- While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.

RECOMMENDATION: That SECDEF approve the USSOUTHCOM Commander's use of those counter-resistance techniques listed in Categories I and II and the fourth technique listed in Category III during the interrogation of detainees at Guantanamo Bay.

SECDEF DECISION:

Approved D.A. Disapproved_____ Other_____

Attachments
As stated

cc: CJCS, USD(P)

However, I stand for 8-10 hours
A day. Why is standard limited to 4 hours?

D.A. DEC 02 2002

Declassified Under Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
William P. Marriott, CAPT, USN
June 18, 2004

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X04030-02

DEPARTMENT OF DEFENSE
UNITED STATES SOUTHERN COMMAND
OFFICE OF THE COMMANDER
3511 NW 91ST AVENUE
MIAMI, FL 33172-1217

REPLY TO ATTENTION OF

SCCDR

25 October 2002

MEMORANDUM FOR Chairman of the Joint Chiefs of Staff, Washington, DC 20318-9999

SUBJECT: Counter-Resistance Techniques

1. The activities of Joint Task Force 170 have yielded critical intelligence support for forces in combat, combatant commanders, and other intelligence/law enforcement entities prosecuting the War on Terrorism. However, despite our best efforts, some detainees have tenaciously resisted our current interrogation methods. Our respective staffs, the Office of the Secretary of Defense, and Joint Task Force 170 have been trying to identify counter-resistant techniques that we can lawfully employ.

2. I am forwarding Joint Task Force 170's proposed counter-resistance techniques. I believe the first two categories of techniques are legal and humane. I am uncertain whether all the techniques in the third category are legal under US law, given the absence of judicial interpretation of the US torture statute. I am particularly troubled by the use of implied or expressed threats of death of the detainee or his family. However, I desire to have as many options as possible at my disposal and therefore request that Department of Defense and Department of Justice lawyers review the third category of techniques.

3. As part of any review of Joint Task Force 170's proposed strategy, I welcome any suggested interrogation methods that others may propose. I believe we should provide our interrogators with as many legally permissible tools as possible.

4. Although I am cognizant of the important policy ramifications of some of these proposed techniques, I firmly believe that we must quickly provide Joint Task Force 170 counter-resistance techniques to maximize the value of our intelligence collection mission.

James T. Hill
General, US Army
Commander

Encls

1. JTF 170 CDR Memo dtd 11 October, 2002
2. JTF 170 SJA Memo dtd 11 October, 2002
3. JTF 170 J-2 Memo dtd 11 October, 2002

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Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF 170-CG

11 October 2002

MEMORANDUM FOR Commander, United States Southern Command, 3511 NW 91st Avenue, Miami, Florida 33172-1217

SUBJECT: Counter-Resistance Strategies

1. Request that you approve the interrogation techniques delineated in the enclosed Counter-Resistance Strategies memorandum. I have reviewed this memorandum and the legal review provided to me by the JTF-170 Staff Judge Advocate and concur with the legal analysis provided.

2. I am fully aware of the techniques currently employed to gain valuable intelligence in support of the Global War on Terrorism. Although these techniques have resulted in significant exploitable intelligence, the same methods have become less effective over time. I believe the methods and techniques delineated in the accompanying J-2 memorandum will enhance our efforts to extract additional information. Based on the analysis provided by the JTF-170 SJA, I have concluded that these techniques do not violate U.S. or international laws.

3. My point of contact for this issue is LTC Jerald Phifer at DSN 660-3476.

MICHAEL B. DUNLAVEY
Major General, USA
Commanding

2 Encls
1. JTF 170-J2 Memo, 11 Oct 02
2. JTF 170-SJA Memo, 11 Oct 02

DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF 170-SJA

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJ: Legal Review of Aggressive Interrogation Techniques

1. I have reviewed the memorandum on Counter-Resistance Strategies, dated 11 Oct 02, and agree that the proposed strategies do not violate applicable federal law. Attached is a more detailed legal analysis that addresses the proposal.

2. I recommend that interrogators be properly trained in the use of the approved methods of interrogation, and that interrogations involving category II and III methods undergo a legal review prior to their commencement.

3. This matter is forwarded to you for your recommendation and action.

DIANE E. BEAVER
LTC, USA
Staff Judge Advocate

2 Encls
1. JTF 170-J2 Memo, 11 Oct 02
2. JTF 170-SJA Memo, 11 Oct 02

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DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF 170-SJA

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

1. (~~S//NF~~) ISSUE: To ensure the security of the United States and its Allies, more aggressive interrogation techniques than the ones presently used, such as the methods proposed in the attached recommendation, may be required in order to obtain information from detainees that are resisting interrogation efforts and are suspected of having significant information essential to national security. This legal brief references the recommendations outlined in the JTF-170-J2 memorandum, dated 11 October 2002.

2. (~~S//NF~~) FACTS: The detainees currently held at Guantanamo Bay, Cuba (GTMO), are not protected by the Geneva Conventions (GC). Nonetheless, DoD interrogators trained to apply the Geneva Conventions have been using commonly approved methods of interrogation such as rapport building through the direct approach, rewards, the multiple interrogator approach, and the use of deception. However, because detainees have been able to communicate among themselves and debrief each other about their respective interrogations, their interrogation resistance strategies have become more sophisticated. Compounding this problem is the fact that there is no established clear policy for interrogation limits and operations at GTMO, and many interrogators have felt in the past that they could not do anything that could be considered "controversial." In accordance with President Bush's 7 February 2002 directive, the detainees are not Enemy Prisoners of War (EPW). They must be treated humanely and, subject to military necessity, in accordance with the principles of GC.

3. (~~S//NF~~) DISCUSSION: The Office of the Secretary of Defense (OSD) has not adopted specific guidelines regarding interrogation techniques for detainee operations at GTMO. While the procedures outlined in, Army FM 34-52 Intelligence Interrogation (28 September 1992), are utilized, they are constrained by, and conform to the GC and applicable international law, and therefore are not binding. Since the detainees are not EPWs, the Geneva Conventions limitations that ordinarily would govern captured enemy personnel interrogations are not binding on U.S. personnel conducting detainee interrogations at GTMO. Consequently, in the absence of specific binding guidance, and in accordance with the President's directive to treat the detainees humanely, we must look to applicable international and domestic law in order to determine the legality of the more aggressive interrogation techniques recommended in the J2 proposal.

a. (U) International Law: Although no international body of law directly applies, the more notable international treaties and relevant law are listed below.

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By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

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JTF170-SJA
SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

(1) (U) In November of 1994, the United States ratified The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. However, the United States took a reservation to Article 16, which defined cruel, inhumane and degrading treatment or punishment, by instead deferring to the current standard articulated in the 8th Amendment to the United States Constitution. Therefore, the United States is only prohibited from committing those acts that would otherwise be prohibited under the United States Constitutional Amendment against cruel and unusual punishment. The United States ratified the treaty with the understanding that the convention would not be self-executing, that is, that it would not create a private cause of action in U.S. Courts. This convention is the principal U.N. treaty regarding torture and other cruel, inhumane, or degrading treatment.

(2) (U) The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, prohibits inhumane treatment in Article 7, and arbitrary arrest and detention in Article 9. The United States ratified it on the condition that it would not be self-executing, and it took a reservation to Article 7 that we would only be bound to the extent that the United States Constitution prohibits cruel and unusual punishment.

(3) (U) The American Convention on Human Rights forbids inhumane treatment, arbitrary imprisonment, and requires the state to promptly inform detainees of the charges against them, to review their pretrial confinement, and to conduct a trial within a reasonable time. The United States signed the convention on 1 June 1977, but never ratified it.

(4) (U) The Rome Statute established the International Criminal Court and criminalized inhumane treatment, unlawful deportation, and imprisonment. The United States not only failed to ratify the Rome Statute, but also later withdrew from it.

(5) (U) The United Nations' Universal Declaration of Human Rights, prohibits inhumane or degrading punishment, arbitrary arrest, detention, or exile. Although international declarations may provide evidence of customary international law (which is considered binding on all nations even without a treaty), they are not enforceable by themselves.

(6) (U) There is some European case law stemming from the European Court of Human Rights on the issue of torture. The Court ruled on allegations of torture and other forms of inhumane treatment by the British in the Northern Ireland conflict. The British authorities developed practices of interrogation such as forcing detainees to stand for long hours, placing black hoods over their heads, holding the detainees prior to interrogation in a room with continuing loud noise, and depriving them of sleep, food, and water. The European Court concluded that these acts did not rise to the level of torture as defined in the Convention Against Torture, because torture was defined as an aggravated form of cruel, inhuman, or degrading treatment or punishment. However, the Court did find that these techniques constituted cruel, inhumane, and degrading treatment. Nonetheless, and as previously mentioned, not only is the United States not a part of the European Human Rights Court, but as previously stated, it only ratified the definition of cruel, inhuman, and degrading treatment consistent with the U.S. Constitution. See also Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Geor. 2002); Committee Against Torture v. Israel, Supreme Court of Israel, 6 Sep 99, 7 BHRC 31; Ireland v. UK (1978), 2 EHRR 25.

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SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

b. (U) Domestic Law: Although the detainee interrogations are not occurring in the continental United States, U.S. personnel conducting said interrogations are still bound by applicable Federal Law, specifically, the Eighth Amendment of the United States Constitution, 18 U.S.C. § 2340, and for military interrogators, the Uniform Code of Military Justice (UCMJ).

(1) (U) The Eighth Amendment of the United States Constitution provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. There is a lack of Eighth Amendment case law relating to the content of interrogations, as most of the Eighth Amendment litigation in federal court involves either the death penalty, or 42 U.S.C. § 1983 actions from inmates based on prison conditions. The Eighth Amendment applies as to whether or not torture or inhumane treatment has occurred under the federal torture statute.[1]

(a) (U) A principal case in the confinement context that is instructive regarding Eighth Amendment analysis (which is relevant because the United States adopted the Convention Against Torture, Cruel, Inhumane and Degrading Treatment, it did so deferring to the Eighth Amendment of the United States Constitution) and conditions of confinement if a U.S. court were to examine the issue is Hudson v. McMillian, 503 U.S. 1 (1992). The issue in Hudson stemmed from a 42 U.S.C. § 1983 action alleging that a prison inmate suffered minor bruises, facial swelling, loosened teeth, and a cracked dental plate resulting from a beating by prison guards while he was cuffed and shackled. In this case the Court held that there was no governmental interest in beating an inmate in such a manner. The Court further ruled that the use of excessive physical force against a prisoner might constitute cruel and unusual punishment, even though the inmate does not suffer serious injury.

(b) (U) In Hudson, the Court relied on Whitley v. Albers, 475 U.S. 312 (1986), as the seminal case that establishes whether a constitutional violation has occurred. The Court stated that the extent of the injury suffered by an inmate is only one of the factors to be considered, but that there is no significant injury requirement in order to establish an Eighth Amendment violation, and that the absence of serious injury is relevant to, but does not end, the Eighth Amendment inquiry. The Court based its decision on the "...settled rule that the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Whitley at 319, *quoting* Ingraham v. Wright, 430 U.S. 651, 670 (1977). The Hudson Court then held that in the excessive force or conditions of confinement context, the Eighth Amendment violation test delineated by the Supreme Court in Hudson is that when prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated, whether or not significant injury is evident. The extent of injury suffered by an inmate is one factor that may suggest whether the use of force could plausibly have been thought necessary in a particular situation, but the question of whether the measure taken inflicted unnecessary and wanton pain and suffering, ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very (emphasis added) purpose of causing harm. If so, the Eighth Amendment claim will prevail.

[1] Notwithstanding the argument that U.S. personnel are bound by the Constitution, the detainees confined at GTMO have no jurisdictional standing to bring a section 1983 action alleging an Eighth Amendment violation in U.S. Federal Court.

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(c) (U) At the District Court level, the typical conditions-of-confinement claims involve a disturbance of the inmate's physical comfort, such as sleep deprivation or loud noise. The Eighth Circuit ruled in Singh v. Holcomb, 1992 U.S. App. LEXIS 24790, that an allegation by an inmate that he was constantly deprived of sleep which resulted in emotional distress, loss of memory, headaches, and poor concentration, did not show either the extreme deprivation level, or the officials' culpable state of mind required to fulfill the objective component of an Eighth Amendment conditions-of-confinement claim.

(d) (U) In another sleep deprivation case alleging an Eighth Amendment violation, the Eighth Circuit established a totality of the circumstances test, and stated that if a particular condition of detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. In Ferguson v. Cape Girardeau County, 88 F.3d 647 (8th Cir. 1996), the complainant was confined to a 5-1/2 by 5-1/2 foot cell without a toilet or sink, and was forced to sleep on a mat on the floor under bright lights that were on twenty-four hours a day. His Eighth Amendment claim was not successful because he was able to sleep at some point, and because he was kept under those conditions due to a concern for his health, as well as the perceived danger that he presented. This totality of the circumstances test has also been adopted by the Ninth Circuit. In Green v. CSO Strack, 1995 U.S. App. LEXIS 14451, the Court held that threats of bodily injury are insufficient to state a claim under the Eighth Amendment, and that sleep deprivation did not rise to a constitutional violation where the prisoner failed to present evidence that he either lost sleep or was otherwise harmed.

(e) (U) Ultimately, an Eighth Amendment analysis is based primarily on whether the government had a good faith legitimate governmental interest, and did not act maliciously and sadistically for the very purpose of causing harm.

(2) (U) The torture statute (18 U.S.C. § 2340) is the United States' codification of the signed and ratified provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and pursuant to subsection 2340B, does not create any substantive or procedural rights enforceable by law by any party in any civil proceeding.

(a) (U) The statute provides that "whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."

(b) (U) Torture is defined as "an act committed by a person acting under color of law *specifically intended* (emphasis added) to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within his custody or physical control." The statute defines "severe mental pain or suffering" as "the *prolonged mental harm caused by or resulting* (emphasis added) from the intentional infliction or threatened infliction of severe physical pain or suffering; or the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses of the personality; or the threat of imminent death; or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality."

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(c) (U) Case law in the context of the federal torture statute and interrogations is also lacking, as the majority of the case law involving torture relates to either the illegality of brutal tactics used by the police to obtain confessions (in which the Court simply state that these confessions will be deemed as involuntary for the purposes of admissibility and due process, but does not actually address torture or the Eighth Amendment), or the Alien Torts Claim Act, in which federal courts have defined that certain uses of force (such as kidnapping, beating and raping of a pad with the consent or acquiescence of a public official. See Ortiz v. Gramajo, 886 F.Supp. 162 (D. Mass. 1995)) constituted torture. However, no case law on point within the context of 18 USC 2340.

(3) (U) Finally, U.S. military personnel are subject to the Uniform Code of Military Justice. The punitive articles that could potentially be violated depending on the circumstances and results of an interrogation are: Article 93 (cruelty and maltreatment), Article 118 (murder), Article 119 (manslaughter), Article 124 (maiming), Article 128 (assault), Article 134 (communicating a threat, and negligent homicide), and the inchoate offenses of attempt (Article 80), conspiracy (Article 81), accessory after the fact (Article 78), and solicitation (Article 82). Article 128 is the article most likely to be violated because a simple assault can be consummated by an unlawful demonstration of violence which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm, and a specific intent to actually inflict bodily harm is not required.

4. (U) ANALYSIS: The counter-resistance techniques proposed in the JTF-170-J2 memorandum are lawful because they do not violate the Eighth Amendment to the United States Constitution or the federal torture statute as explained below. An international law analysis is not required for the current proposal because the Geneva Conventions do not apply to these detainees since they are not EPWs.

(a) (U) Based on the Supreme Court framework utilized to assess whether a public official has violated the Eighth Amendment, so long as the force used could plausibly have been thought necessary in a particular situation to achieve a legitimate governmental objective, and it was applied in a good faith effort and not maliciously or sadistically for the very purpose of causing harm, the proposed techniques are likely to pass constitutional muster. The federal torture statute will not be violated so long as any of the proposed strategies are not specifically intended to cause severe physical pain or suffering or prolonged mental harm. Assuming that severe physical pain is not inflicted, absent any evidence that any of these strategies will in fact cause prolonged and long lasting mental harm, the proposed methods will not violate the statute.

(b) (U) Regarding the Uniform Code of Military Justice, the proposal to grab, poke in the chest, push lightly, and place a wet towel or hood over the detainee's head would constitute a per se violation of Article 128 (Assault). Threatening a detainee with death may also constitute a violation of Article 128, or also Article 134 (communicating a threat). It would be advisable to have permission or immunity in advance from the convening authority, for military members utilizing these methods.

(c) (U) Specifically, with regard to Category I techniques, the use of mild and fear related approaches such as yelling at the detainee is not illegal because in order to communicate a threat, there must also exist an intent to injure. Yelling at the detainee is legal so long as the yelling is not done with the intent to cause severe physical damage or prolonged mental harm. Techniques of deception such as multiple interrogator techniques, and deception regarding interrogator identity are all permissible methods of interrogation, since there is no legal requirement to be truthful while conducting an interrogation.

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(d) (U) With regard to Category II methods, the use of stress positions such as the proposed standing for four hours, the use of isolation for up to thirty days, and interrogating the detainee in an environment other than the standard interrogation booth are all legally permissible so long as no severe physical pain is inflicted and prolonged mental harm intended, and because there is a legitimate governmental objective in obtaining the information necessary that the high value detainees on which these methods would be utilized possess, for the protection of the national security of the United States, its citizens, and allies. Furthermore, these methods would not be utilized for the "very malicious and sadistic purpose of causing harm," and absent medical evidence to the contrary, there is no evidence that prolonged mental harm would result from the use of these strategies. The use of falsified documents is legally permissible because interrogators may use deception to achieve their purpose.

(e) (U) The deprivation of light and auditory stimuli, the placement of a hood over the detainee's head during transportation and questioning, and the use of 20 hour interrogations are all legally permissible so long as there is an important governmental objective, and it is not done for the purpose of causing harm or with the intent to cause prolonged mental suffering. There is no legal requirement that detainees must receive four hours of sleep per night, but if a U.S. Court ever had to rule on this procedure, in order to pass Eighth Amendment scrutiny, and as a cautionary measure, they should receive some amount of sleep so that no severe physical or mental harm will result. Removal of comfort items is permissible because there is no legal requirement to provide comfort items. The requirement is to provide adequate food, water, shelter, and medical care. The issue of removing published religious items or materials would be relevant if these were United States citizens with a First Amendment right. Such is not the case with the detainees. Forced grooming and removal of clothing are not illegal, so long as it is not done to punish or cause harm, as there is a legitimate governmental objective to obtain information, maintain health standards in the camp and protect both the detainees and the guards. There is no illegality in removing hot meals because there is no specific requirement to provide hot meals, only adequate food. The use of the detainee's phobias is equally permissible.

(f) (U) With respect to the Category III advanced counter-resistance strategies, the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent is not illegal for the same aforementioned reasons that there is a compelling governmental interest and it is not done intentionally to cause prolonged harm. However, caution should be utilized with this technique because the torture statute specifically mentions making death threats as an example of inflicting mental pain and suffering. Exposure to cold weather or water is permissible with appropriate medical monitoring. The use of a wet towel to induce the misperception of suffocation would also be permissible if not done with the specific intent to cause prolonged mental harm, and absent medical evidence that it would. Caution should be exercised with this method, as foreign courts have already advised about the potential mental harm that this method may cause. The use of physical contact with the detainee, such as pushing and poking will technically constitute an assault under Article 128, UCMJ.

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JTF170-SJA
SUBJECT: Legal Brief on Proposed Counter-Resistance Strategies

5. ~~(S//NF)~~ RECOMMENDATION: I recommend that the proposed methods of interrogation be approved, and that the interrogators be properly trained in the use of the approved methods of interrogation. Since the law requires examination of all facts under a totality of circumstances test, I further recommend that all proposed interrogations involving category II and III methods must undergo a legal, medical, behavioral science, and intelligence review prior to their commencement.

6. (U) POC: Captain Michael Borden, x3596.

DIANE E. BEAVER
LTC, USA
Staff Judge Advocate

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DEPARTMENT OF DEFENSE
JOINT TASK FORCE 170
GUANTANAMO BAY, CUBA
APO AE 09360

JTF-J2

11 October 2002

MEMORANDUM FOR Commander, Joint Task Force 170

SUBJECT: Request for Approval of Counter-Resistance Strategies

1. (~~S//NF~~) PROBLEM: The current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter advanced resistance.

2. (~~S//NF~~) Request approval for use of the following interrogation plan.

a. Category I techniques. During the initial category of interrogation the detainee should be provided a chair and the environment should be generally comfortable. The format of the interrogation is the direct approach. The use of rewards like cookies or cigarettes may be helpful. If the detainee is determined by the interrogator to be uncooperative, the interrogator may use the following techniques.

(1) Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems)

(2) Techniques of deception:

(a) Multiple interrogator techniques.

(b) Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees.

b. Category II techniques. With the permission of the OIC, Interrogation Section, the interrogator may use the following techniques.

(1) The use of stress positions (like standing), for a maximum of four hours.

(2) The use of falsified documents or reports.

(3) Use of the isolation facility for up to 30 days. Request must be made to through the OIC, Interrogation Section, to the Director, Joint Interrogation Group (JIG). Extensions beyond the initial 30 days must be approved by the Commanding General. For selected

Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

detainees, the OIC, Interrogation Section, will approve all contacts with the detainee, to include medical visits of a non-emergent nature.

(4) Interrogating the detainee ~~in an environment other than the standard interrogation~~ booth.

~~(5) Deprivation of light and auditory stimuli.~~

(6) The detainee may also have ~~a hood placed over his head during transportation and~~ questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.

~~(7) The use of 20-hour interrogations.~~

~~(8) Removal of all comfort items (including religious items).~~

~~(9) Switching the detainee from hot rations to MREs.~~

~~(10) Removal of clothing.~~

~~(11) Forced grooming (shaving of facial hair etc...)~~

~~(12) Using detainees individual phobias (such as fear of dogs) to induce stress.~~

c. Category III techniques. Techniques in this category may be used only by submitting a request through the Director, JIG, for approval by the Commanding General with appropriate legal review and information to Commander, USSOUTHCOM. These techniques are required for a very small percentage of the most uncooperative detainees (less than 3%). The following techniques and other aversive techniques, such as those used in U.S. military interrogation resistance training or by other U.S. government agencies, may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees. Any or these techniques that require more than light grabbing, poking, or pushing, will be administered only by individuals specifically trained in their safe application.

~~(1) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.~~

(2) Exposure to cold weather or water (with appropriate medical monitoring).

~~(3) Use of a wet towel and dripping water to induce the misperception of suffocation.~~

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(4) Use of ~~raild, non-injurious physical contact~~ such as grabbing, poking in the chest with the finger, and light pushing.

3. (U) The POC for this memorandum is the undersigned at x3476.

JERALD PHIFER
LTC, USA
Director, J2

December 16, 2002

National Security Presidential Directive

Subject: National Policy on Ballistic Missile Defense

THE WHITE HOUSE

WASHINGTON

December 16, 2002

NATIONAL SECURITY PRESIDENTIAL DIRECTIVE/NSPD-23

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF THE TREASURY
THE SECRETARY OF DEFENSE
THE SECRETARY OF ENERGY
DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET
CHIEF OF STAFF TO THE PRESIDENT
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
DIRECTOR, OFFICE OF SCIENCE AND TECHNOLOGY POLICY
DIRECTOR OF CENTRAL INTELLIGENCE
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: National Policy on Ballistic Missile Defense

Restructuring our defense and deterrence capabilities to correspond to emerging threats remains one of the Administration's highest priorities, and the deployment of missile defenses is an essential component of this broader effort.

Changed Security Environment

As the events of September 11 demonstrated, the security environment is more complex and less predictable than in the past. We face growing threats from weapons of mass destruction (WMD) in the hands of states or non-state actors, threats that range from terrorism to ballistic missiles intended to intimidate and coerce us by holding our cities hostage to WMD attack.

Hostile states, including those that sponsor terrorism, are investing large resources to develop and acquire ballistic missiles of increasing range and sophistication that could be used against the United States and our friends and allies. These same states have chemical, biological, and/or nuclear weapons programs. In fact, one of the factors that make long-range ballistic missiles attractive as a delivery vehicle for weapons of mass destruction is that the United States and our allies lack effective defenses against this threat.

The contemporary and emerging missile threat from hostile states is fundamentally different from that of the Cold War and requires a different approach to deterrence and new tools for defense. The strategic logic of the past may not apply to these new threats. We cannot be wholly confident in our capability to deter them. Compared to the Soviet Union, their leaderships often are more risk prone. These are leaders that also see WMD as weapons of choice, not of last resort. Weapons of mass destruction are their most lethal means to compensate for our conventional strength and to allow them to pursue their objectives through force, coercion, and intimidation.

Deterring these threats will be difficult. There are no mutual understandings or reliable lines of communication with these states. Moreover, the dynamics of deterrence are different than in the Cold War when we sought to keep the Soviet Union from expanding outward. What our new adversaries seek is to keep us out of their region, leaving them free to support terrorism and to pursue aggression against their neighbors. By their own calculations, these leaders may believe they can do this by holding a few of our cities hostage. Our adversaries seek enough destructive capability to blackmail us from coming to the assistance of our friends who would then become the victims of aggression. In recognition of these new threats, I have directed that the United States must make progress in fielding a new triad composed of long-range conventional and nuclear strike capabilities, missile defenses, and a robust industrial and research development infrastructure.

Some states, such as North Korea, are aggressively pursuing the development of weapons of mass destruction and long-range missiles as a means of coercing the United States and our allies. To deter such threats, we must devalue missiles as tools of extortion and aggression, undermining the confidence of our adversaries that threatening a missile attack would succeed in blackmailing us. In this way, although missile defenses are not a replacement for an offensive response capability, they are an added and critical dimension of contemporary deterrence. Missile defenses will also help to assure allies and friends, and to dissuade countries from pursuing ballistic missiles in the first instance by undermining their military utility.

Finally, history teaches that, despite our best efforts, there will be military surprises, failures of diplomacy, intelligence, and deterrence. Missile defenses help provide protection against such events.

National Missile Defense Act of 1999

On July 22, 1999, the National Missile Defense Act of 1999 (Public Law 106-38) was signed into law. This law states, "It is the policy of the United States to deploy as soon as is technologically possible an effective National Missile Defense system capable of defending the territory of the United States against limited ballistic missile attack (whether accidental, unauthorized, or deliberate) with funding subject to the annual authorization of appropriations and the annual appropriation of funds for National Missile Defense." The Administration's program on missile defense is fully consistent with this policy.

Missile Defense Program

Upon taking office, I directed the Secretary of Defense to examine the full range of available technologies and basing modes for missile defenses that could protect the United States, our deployed forces, and our friends and allies. As I have previously directed, our policy is to develop and deploy, at the earliest possible date, ballistic missile defenses drawing on the best technologies available.

The Administration has also eliminated the artificial distinction between "national" and "theater" missile defenses.

- The defenses we will develop and deploy must be capable of not only defending the United States and our deployed forces, but also friends and allies;
- The distinction between theater and national defenses was largely a product of the ABM Treaty and is outmoded. For example, some of the systems we are pursuing, such as boost-phase defenses, are intended to be capable of intercepting missiles of all ranges, blurring the distinction between theater and national defenses; and
- The terms "theater" and "national" are interchangeable depending on the circumstances, and thus are not a meaningful means of categorizing missile defenses. For example, some of the systems being pursued by the United States to protect deployed forces are capable of defending the entire national territory of some friends and allies, thereby meeting the definition of a "national" missile defense system.

Building on previous missile defense work, over the past year and a half, the Defense Department has pursued a robust research, development, testing, and evaluation program designed to develop layered defenses capable of intercepting missiles of varying ranges in all phases of flight. The testing regimen employed has

become increasingly stressing, and the results of recent tests have been impressive.

Fielding Missile Defenses

In light of the changed security environment and progress made to date in our development efforts, the United States plans to begin deployment of a set of missile defense capabilities in 2004. These capabilities will serve as a starting point for fielding improved and expanded missile defense capabilities later.

The Defense Department plans to employ an evolutionary approach to the development and deployment of missile defenses to improve our defenses over time. The United States will not have a final, fixed missile defense architecture. Rather, we will deploy an initial set of capabilities that will evolve to meet the changing threat and to take advantage of technological developments. The composition of missile defenses, to include the number and location of systems deployed, will change over time.

In August 2002, the Secretary of Defense proposed an evolutionary way ahead for the deployment of missile defenses. The capabilities planned for operational use in 2004 and 2005 will include ground-based interceptors, sea-based interceptors, additional Patriot (PAC-3) units, and sensors based on land, at sea, and in space. In addition, the United States will seek permission respectively from the U.K. and Denmark to upgrade early-warning radars in Fylingdales and Thule, Greenland as part of our capability.

Under the approach presented by the Secretary of Defense, these capabilities may be improved through additional measures such as:

- Deployment of additional ground- and sea based interceptors, and Patriot (PAC-3) units;
- Initial deployment of the THAAD and Airborne Laser systems;
- Development of a family of boost-phase and midcourse hit-to-kill interceptors based on sea-, air-, and ground-based platforms;
- Enhanced sensor capabilities; and
- Development and testing of space-based defenses.

The Defense Department shall begin to execute the approach proposed by the Secretary of Defense and shall proceed with plans to deploy a set of initial missile defense capabilities beginning in 2004. Recognizing the evolutionary nature of our missile defense program, the Secretary of Defense, as appropriate, shall update me and propose changes.

Cooperation with Friends and Allies

Because the threats of the 21st century also endanger our friends and allies around the world, it is essential that we work together to defend against these threats. Missile defense cooperation will be a feature of U.S. relations with close, long-standing allies, and an important means to build new relationships with new friends like Russia.

- The Department of Defense shall develop and deploy missile defenses capable of protecting not only the United States and our deployed forces, but also friends and allies;
- The Secretary of Defense shall also structure the missile defense program in a manner that encourages industrial participation by friends and allies, consistent with overall U.S. national security; and
- The Secretaries of Defense and State shall promote international missile defense cooperation, including within bilateral and alliance structures such as NATO, and shall negotiate appropriate arrangements for this purpose.

As part of our efforts to deepen missile defense cooperation with friends and allies, the United States shall seek to eliminate unnecessary impediments to such cooperation. The Secretaries of Defense and State shall review existing policies and practices governing technology sharing and cooperation on missile defense, including U.S. export control regulations and statutes, with this aim in mind. They shall issue a report with recommendations for improvements including, if appropriate, proposals for statutory changes within 6 months. This review will be a related, but distinct part of the broader effort to update and strengthen all U.S. export controls, as called for in the National Strategy to Combat Weapons of Mass Destruction.

The goal of the Missile Technology Control Regime (MTCR) is to help reduce the global missile threat by curbing the flow of missiles and related technology to proliferators. The MTCR and missile defenses play complementary roles in countering the global missile threat. The United States intends to implement the MTCR in a manner that does not impede missile defense cooperation with friends and allies. In support of these objectives, the Secretaries of Defense and State shall review U.S. policy concerning the impact of U.S. commitments under the MTCR on cooperation and transfers of missile defense systems and technology to other countries and issue a joint report in 6 months on the results of that review. The report should include any recommendations for improvements to existing policies and practices.

Conclusion

The new strategic challenges of the 21st century require us to think differently, but they also require us to act. The deployment of effective missile defenses is an essential element of the United States' broader efforts to transform our defense and deterrence policies and capabilities to meet the new threats we face. Defending the American people against these new threats is my highest priority as Commander in Chief, and the highest priority of my Administration.



**December 28, 2001**

**Department of Justice Memorandum From: Deputy Assistant Attorney General, John Yoo and Deputy Assistant Attorney General, Patrick F. Philbin**

**To: William J. Haynes II, General Counsel, Department of Defense**

**RE: Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba**

U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

January 9, 2002

**MEMORANDUM FOR WILLIAM J. HAYNES II**
**GENERAL COUNSEL, DEPARTMENT OF DEFENSE**

DRAFT

**FROM:** John Yoo
Deputy Assistant Attorney General

Robert J. Delahunty
Special Counsel

**RE:** *Application of Treaties and Laws to al Qaeda and Taliban Detainees*

You have asked for our Office's views concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan. In particular, you have asked whether the laws of armed conflict apply to the conditions of detention and the procedures for trial of members of al Qaeda and the Taliban militia. We conclude that these treaties do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that that these treaties do not apply to the Taliban militia. This memorandum expresses no view as to whether the President should decide, as a matter of policy, that the U.S. Armed Forces should adhere to the standards of conduct in those treaties with respect to the treatment of prisoners.

We believe it most useful to structure the analysis of these questions by focusing on the War Crimes Act, 18 U.S.C. § 2441 (Supp. III 1997) ("WCA"). The WCA directly incorporates several provisions of international treaties governing the laws of war into the federal criminal code. Part I of this memorandum describes the WCA and the most relevant treaties that it incorporates: the four 1949 Geneva Conventions, which generally regulate the treatment of non-combatants, such as prisoners of war ("POWs"), the injured and sick, and civilians.[1]

Part II examines whether al Qaeda detainees can claim the protections of these agreements. Al Qaeda is merely a violent political movement or organization and not a nation-state. As a result, it is ineligible to be a signatory to any treaty. Because of the novel nature of

[1] The four Geneva Conventions for the Protection of Victims of War, dated August 12, 1949, were ratified by the United States on July 14, 1955. These are the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3115 ("Geneva Convention I"); the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3219 ("Geneva Convention II"); the Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3517 ("Geneva Convention III"); and the Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3317 ("Geneva Convention IV").

this conflict, moreover, we do not believe that al Qaeda would be included in non-international forms of armed conflict to which some provisions of the Geneva Conventions might apply. Therefore, neither the Geneva Conventions nor the WCA regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict.

Part III discusses whether the same treaty provisions, as incorporated through the WCA, apply to the treatment of captured members of the Taliban militia. We believe that the Geneva Conventions do not apply for several reasons. First, the Taliban was not a government and Afghanistan was not – even prior to the beginning of the present conflict – a functioning State during the period in which they engaged in hostilities against the United States and its allies. Afghanistan's status as a failed state is ground alone to find that members of the Taliban militia are not entitled to enemy POW status under the Geneva Conventions. Further, it is clear that the President has the constitutional authority to suspend our treaties with Afghanistan pending the restoration of a legitimate government capable of performing Afghanistan's treaty obligations. Second, it appears from the public evidence that the Taliban militia may have been so intertwined with al Qaeda as to be functionally indistinguishable from it. To the extent that the Taliban militia was more akin to a non-governmental organization that used military force to pursue its religious and political ideology than a functioning government, its members would be on the same legal footing as al Qaeda.

In Part IV, we address the question whether any customary international law of armed conflict might apply to the al Qaeda or Taliban militia members detained during the course of the Afghanistan conflict. We conclude that customary international law, whatever its source and content, does not bind the President, or restrict the actions of the United States military, because it does not constitute federal law recognized under the Supremacy Clause of the Constitution. The President, however, has the constitutional authority as Commander in Chief to interpret and apply the customary or common laws of war in such a way that they would extend to the conduct of members of both al Qaeda and the Taliban, and also to the conduct of the U.S. Armed Forces towards members of those groups taken as prisoners in Afghanistan.

## *I. Background and Overview of the War Crimes Act and the Geneva Conventions*

It is our understanding that your Department is considering two basic plans regarding the treatment of members of al Qaeda and the Taliban militia detained during the Afghanistan conflict. First, the Defense Department intends to make available a facility at the U.S. Navy base at Guantanamo Bay, Cuba, for the long-term detention of these individuals, who have come under our control either through capture by our military or transfer from our allies in Afghanistan. We have discussed in a separate memorandum the federal jurisdiction issues that might arise concerning Guantanamo Bay.[2] Second, your Department is developing procedures to implement the President's Military Order of November 13, 2001, which establishes military

[2] *See* Memorandum for William J. Haynes II, General Counsel, Department of Defense, from: Patrick F. Philbin, Deputy Assistant Attorney General, and John Yoo, Deputy Assistant Attorney General, *Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001).

commissions for the trial of violations of the laws of war committed by non-U.S. citizens.[3] The question has arisen whether the Geneva Conventions, or other relevant international treaties or federal laws, regulate these proposed policies.

We believe that the WCA provides a useful starting point for our analysis of the application of the Geneva Conventions to the treatment of detainees captured in the Afghanistan theater of operations.[4] Section 2441 of Title 18 renders certain acts punishable as "war crimes." The statute's definition of that term incorporates, by reference, certain treaties or treaty provisions relating to the laws of war, including the Geneva Conventions.

### A. *Section 2441: An Overview*

Section 2441 reads in full as follows:

*War crimes*

(a) Offense.–Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.–The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition.–As used in this section the term "war crime" means any conduct–

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

[3] *See generally* Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001).

[4] The rule of lenity requires that the WCA be read so as to ensure that prospective defendants have adequate notice of the nature of the acts that the statute condemns. *See, e.g., Castillo v. United States*, 530 U.S. 120, 131 (2000). In those cases in which the application of a treaty incorporated by the WCA is unclear, therefore, the rule of lenity requires that the interpretative issue be resolved in the defendant's favor.

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

18 U.S.C. § 2441.

Section 2441 lists four categories of war crimes. First, it criminalizes "grave breaches" of the Geneva Conventions, which are defined by treaty and will be discussed below. Second, it makes illegal conduct prohibited by articles 23, 25, 27 and 28 of the Annex to the Hague Convention IV. Third, it criminalizes violations of what is known as "common" Article 3, which is an identical provision common to all four of the Geneva Conventions. Fourth, it criminalizes conduct prohibited by certain other laws of war treaties, once the United States joins them. A House Report states that the original legislation "carries out the international obligations of the United States under the Geneva Conventions of 1949 to provide criminal penalties for certain war crimes." H.R. Rep. No. 104-698 at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2166. Each of those four conventions includes a clause relating to legislative implementation and to criminal punishment.[5]

In enacting section 2441, Congress also sought to fill certain perceived gaps in the coverage of federal criminal law. The main gaps were thought to be of two kinds: subject matter jurisdiction and personal jurisdiction. First, Congress found that "[t]here are major gaps in the prosecutability of individuals under federal criminal law for war crimes committed against Americans." H.R. Rep. No. 104-698 at 6, *reprinted in* 1996 U.S.C.C.A.N. at 2171. For example, "the simple killing of a[n American] prisoner of war" was not covered by any existing Federal statute. *Id.* at 5, *reprinted in* 1996 U.S.C.C.A.N. at 2170.[6] Second, Congress found that "[t]he ability to court martial members of our armed services who commit war crimes ends when they leave military service. [Section 2441] would allow for prosecution even after discharge." *Id.* at

[5] That common clause reads as follows:

> The [signatory Nations] undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention. . . . Each [signatory nation] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. . . . It may also, if it prefers, . . . hand such persons over for trial to another [signatory nation], provided such [nation] has made out a *prima facie* case.

Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

[6] In projecting our criminal law extraterritorially in order to protect victims who are United States nationals, Congress was apparently relying on the international law principle of passive personality. The passive personality principle "asserts that a state may apply law – particularly criminal law – to an act committed outside its territory by a person not its national where the victim of the act was its national." *United States v. Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir.), *cert. denied*, 525 U.S. 834 (1998). The principle marks recognition of the fact that "each nation has a legitimate interest that its nationals and permanent inhabitants not be maimed or disabled from self-support," or otherwise injured. *Lauritzen v. Larsen*, 345 U.S. 571, 586 (1953); *see also Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970).

7, *reprinted in* 1996 U.S.C.C.A.N. at 2172.[7] Congress considered it important to fill this gap, not only in the interest of the victims of war crimes, but also of the accused. "The Americans prosecuted would have available all the procedural protections of the American justice system. These might be lacking if the United States extradited the individuals to their victims' home countries for prosecution." *Id.*[8] Accordingly, Section 2441 criminalizes forms of conduct in which a U.S. national or a member of the Armed Forces may be either a victim or a perpetrator.

B. *Grave Breaches of the Geneva Conventions*

The Geneva Conventions were approved by a diplomatic conference on August 12, 1949, and remain the agreements to which more States have become parties than any other concerning the laws of war. Convention I deals with the treatment of wounded and sick in armed forces in the field; Convention II addresses treatment of the wounded, sick, and shipwrecked in armed forces at sea; Convention III regulates treatment of POWs; Convention IV addresses the treatment of citizens. While the Hague Convention IV establishes the rules of conduct against the enemy, the Geneva Conventions set the rules for the treatment of the victims of war.

The Geneva Conventions, like treaties generally, structure legal relationships between Nation States, not between Nation States and private, subnational groups or organizations.[9] All four Conventions share the same Article 2, known as "common Article 2." It states:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict *which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

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[7] In *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Supreme Court had held that a former serviceman could not constitutionally be tried before a court martial under the Uniform Code for Military Justice (the "UCMJ") for crimes he was alleged to have committed while in the armed services.

[8] The principle of nationality in international law recognizes that (as Congress did here) a State may criminalize acts performed extraterritorially by its own nationals. *See, e.g., Skiriotes v. Florida*, 313 U.S. 69, 73 (1941); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282 (1952).

[9] *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) ("A treaty is in the nature of a contract between nations."); *The Head Money Cases*, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations."); *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 167 (3d Cir. 1997) ("[T]reaties are agreements between nations."); *Vienna Convention on the Law of Treaties*, May 23, 1969, art. 2, § 1(a), 1155 U.N.T.S. 331, 333 ("'[T]reaty' means an international agreement concluded between States in written form and governed by international law. . . .") (the "Vienna Convention"); *see generally Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422 (1964) ("The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another.").

(Emphasis added).

As incorporated by § 2441(c)(1), the four Geneva Conventions similarly define "grave breaches." Geneva Convention III on POWs defines a grave breach as:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

Geneva Convention III, art. 130. As mentioned before, the Geneva Conventions require the High Contracting Parties to enact penal legislation to punish anyone who commits or orders a grave breach. *See, e.g., id.* art. 129. Further, each State party has the obligation to search for and bring to justice (either before its courts or by delivering a suspect to another State party) anyone who commits a grave breach. No State party is permitted to absolve itself or any other nation of liability for committing a grave breach.

Thus, the WCA does not criminalize all breaches of the Geneva Conventions. Failure to follow some of the regulations regarding the treatment of POWs, such as difficulty in meeting all of the conditions set forth for POW camp conditions, does not constitute a grave breach within the meaning of Geneva Convention III, art. 130. Only by causing great suffering or serious bodily injury to POWs, killing or torturing them, depriving them of access to a fair trial, or forcing them to serve in the Armed Forces, could the United States actually commit a grave breach. Similarly, unintentional, isolated collateral damage on civilian targets would not constitute a grave breach within the meaning of Geneva Convention IV, art. 147. Article 147 requires that for a grave breach to have occurred, destruction of property must have been done "wantonly" and without military justification, while the killing or injury of civilians must have been "wilful."

### D. *Common Article 3 of the Geneva Conventions*

Section 2441(c)(3) also defines as a war crime conduct that "constitutes a violation of common Article 3" of the Geneva Conventions. Article 3 is a unique provision that governs the conduct of signatories to the Conventions in a particular kind of conflict that is *not* one between High Contracting Parties to the Conventions. Thus, common Article 3 may require the United States, as a High Contracting Party, to follow certain rules even if other parties to the conflict are not parties to the Conventions. On the other hand, Article 3 requires state parties to follow only certain minimum standards of treatment toward prisoners, civilians, or the sick and wounded, rather than the Conventions as a whole.

Common Article 3 reads in relevant part as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. . . .

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Common article 3 complements common Article 2. Article 2 applies to cases of declared war or of any other armed conflict that may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[10] Common Article 3, however, covers "armed conflict not of an international character" – a war that does not involve cross-border attacks – that occurs within the territory of one of the High Contracting Parties. There is substantial reason to think that this language refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its own territory.

To begin with, Article 3's text strongly supports the interpretation that it applies to large-scale conflicts between a State and an insurgent group. First, the language at the end of Article 3 states that "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict." This provision was designed to ensure that a Party that observed Article 3 during a civil war would not be understood to have granted the "recognition of the insurgents as an adverse party." Frits Kalshoven, *Constraints on the Waging of War* 59 (1987). Second, Article 3 is in terms limited to "armed conflict . . . occurring *in the territory of one of the High Contracting Parties*" (emphasis added). This limitation makes perfect sense if the Article

[10] Article 2's reference to a state of war "not recognized" by a belligerent was apparently intended to refer to conflicts such as the 1937 war between China and Japan. Both sides denied that a state of war existed. *See* Joyce A. C. Gutteridge, *The Geneva Conventions of 1949*, 26 Brit. Y.B. Int'l L. 294, 298-99 (1949).

applies to civil wars, which are fought primarily or solely within the territory of a single state. The limitation makes little sense, however, as applied to a conflict between a State and a transnational terrorist group, which may operate from different territorial bases, some of which might be located in States that are parties to the Conventions and some of which might not be. In such a case, the Conventions would apply to a single armed conflict in some scenes of action but not in others – which seems inexplicable.

This interpretation is supported by commentators. One well-known commentary states that "a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory."[11] A legal scholar writing in the same year in which the Conventions were prepared stated that "a conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . must normally mean a civil war."[12]

Analysis of the background to the adoption of the Geneva Conventions in 1949 confirms our understanding of common Article 3. It appears that the drafters of the Conventions had in mind only the two forms of armed conflict that were regarded as matters of general *international* concern at the time: armed conflict between Nation States (subject to Article 2), and large-scale civil war within a Nation State (subject to Article 3). To understand the context in which the Geneva Conventions were drafted, it will be helpful to identify three distinct phases in the development of the laws of war.

First, the traditional law of war was based on a stark dichotomy between "belligerency" and "insurgency." The category of "belligerency" applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the category of "insurgency" applied to armed violence breaking out within the territory of a sovereign State.[13] Correspondingly, international law treated the two classes of conflict in different ways. Inter-state wars were regulated by a body of international legal rules governing both the conduct of hostilities and the protection of noncombatants. By contrast, there were very few international rules governing civil unrest, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law, which precluded any possible intrusion by other States.[14] This was a "clearly sovereignty-oriented" phase of international law.[15]

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[11] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at ¶ 4339 (Yves Sandoz et al. eds., 1987)

[12] Gutteridge, *supra* n.10, at 300.

[13] *See* Joseph H. Beale, Jr., *The Recognition of Cuban Belligerency*, 9 Harv. L. Rev. 406, 406 n.1 (1896).

[14] *See The Prosecutor v. Dusko Tadic (Jurisdiction of the Tribunal)*, (Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia 1995) (the "ICTY"), 105 I.L.R. 453, 504-05 (E. Lauterpacht and C.J. Greenwood eds., 1997).

[15] *Id.* at 505; *see also* Gerald Irving Draper, *Reflections on Law and Armed Conflicts* 107 (1998) ("Before 1949, in the absence of recognized belligerency accorded to the elements opposed to the government of a State, the law of war . . . had no application to internal armed conflicts. . . . International law had little or nothing to say as to how the armed rebellion was crushed by the government concerned, for such matters fell within the domestic jurisdiction of States. Such conflicts were often waged with great lack of restraint and cruelty. Such conduct was a domestic matter.").

The second phase began as early as the Spanish Civil War (1936-39) and extended through the time of the drafting of the Geneva Conventions until relatively recently. During this period, State practice began to apply certain general principles of humanitarian law beyond the traditional field of State-to-State conflict to "those internal conflicts that constituted large-scale civil wars."[16] In addition to the Spanish Civil War, events in 1947 during the Civil War between the Communists and the Nationalist régime in China illustrated this new tendency.[17] Common Article 3, which was prepared during this second phase, was apparently addressed to armed conflicts akin to the Chinese and Spanish civil wars. As one commentator has described it, Article 3 was designed to restrain governments "in the handling of armed violence directed against them for the express purpose of secession or at securing a change in the government of a State," but even after the adoption of the Conventions it remained "uncertain whether [Article 3] applied to full-scale civil war."[18]

The third phase represents a more complete break than the second with the traditional "State-sovereignty-oriented approach" of international law. This approach gives central place to individual human rights. As a consequence, it blurs the distinction between international and internal armed conflicts, and even that between civil wars and other forms of internal armed conflict. This approach is well illustrated by the ICTY's decision in *Tadic*, which appears to take the view that common Article 3 applies to non-international armed conflicts of *any* description, and is not limited to civil wars between a State and an insurgent group. In this conception, common Article 3 is not just a complement to common Article 2; rather, it is a catch-all that establishes standards for any and all armed conflicts not included in common Article 2.[19]

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[16] *Tadic*, 105 I.L.R. at 507. Indeed, the events of the Spanish Civil War, in which "both the republican Government [of Spain] and third States refused to recognize the [Nationalist] insurgents as belligerents," *id.* at 507, may be reflected in common Article 3's reference to "the legal status of the Parties to the conflict."

[17] *See id.* at 508.

[18] *See* Draper, *Reflections on Law and Armed Conflicts*, *supra*, at 108.

[19] An interpretation of common Article 3 that would apply it to all forms of non-international armed conflict accords better with some recent approaches to international humanitarian law. For example, the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *supra*, after first stating in the text that Article 3 applies when "the government of a single State [is] in conflict with one or more armed factions within its territory," thereafter suggests, in a footnote, that an armed conflict not of an international character "may also exist in which armed factions fight against each other without intervention by the armed forces of the established government." *Id.* ¶ 4339 at n.2. A still broader interpretation appears to be supported by the language of the decision of the International Court of Justice (the "ICJ") in *Nicaragua v. United States* – which, it should be made clear, the United States refused to acknowledge by withdrawing from the compulsory jurisdiction of the ICJ:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied *in the armed conflicts of a non-international character*. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity."

*Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, (International Court of Justice 1986), 76 I.L.R. 1, 448, ¶ 218 (E. Lauterpacht and C.J. Greenwood eds., 1988) (emphasis added). The ICJ's language is probably best read to suggest that all "armed conflicts" are either international or non-international, and that if they are non-international, they are governed by common Article 3. If that is the correct understanding of the quoted language, however, it should be noted that the result was merely stated as a conclusion, without taking account either of the precise language of Article 3 or of the background to its adoption. Moreover, while it was true

Nonetheless, despite this recent trend, we think that such an interpretation of common Article 3 fails to take into account, not only the language of the provision, but also its historical context. First, as we have described above, such a reading is inconsistent with the text of Article 3 itself, which applies only to "armed conflict not of an international character occurring in the territory of one of the High Contacting Parties." In conjunction with common Article 2, the text of Article 3 simply does not reach international conflicts where one of the parties is not a Nation State. If we were to read the Geneva Conventions as applying to all forms of armed conflict, we would expect the High Contracting Parties to have used broader language, which they easily could have done. To interpret common Article 3 by expanding its scope well beyond the meaning borne by the text is effectively to amend the Geneva Conventions without the approval of the State Parties to the agreements.

Second, as we have discussed, Article 3 was prepared during a period in which the traditional, State-centered view of international law was still dominant and was only just beginning to give way to a human-rights-based approach. Giving due weight to the State practice and doctrinal understanding of the time, it seems to us overwhelmingly likely that an armed conflict between a Nation State and a transnational terrorist organization, or between a Nation State and a failed State harboring and supporting a transnational terrorist organization, could not have been within the contemplation of the drafters of common Article 3. These would have been simply unforeseen and, therefore, not provided for. Indeed, it seems to have been uncertain even a decade after the Conventions were signed whether common Article 3 applied to armed conflicts that were neither international in character nor civil wars but anti-colonialist wars of independence such as those in Algeria and Kenya. *See* Gerald Irving Draper, *The Red Cross Conventions* 15 (1957). Further, it is telling that in order to address this unforeseen circumstance, the State Parties to the Geneva Conventions did not attempt to distort the terms of common Article 3 to apply it to cases that did not fit within its terms. Instead, they drafted two new protocols (neither of which the United States has ratified) to adapt the Conventions to the conditions of contemporary hostilities.[20] Accordingly, common Article 3 is best understood not to apply to such armed conflicts.

Third, it appears that in enacting the WCA, Congress did not understand the scope of Article 3 to extend beyond civil wars to all other types of internal armed conflict. As discussed in our review of the legislative history, when extending the WCA to cover violations of common Article 3, the House apparently understood that it was codifying treaty provisions that "forbid atrocities occurring in both civil wars and wars between nations."[21] If Congress had embraced a much broader view of common Article 3, and hence of 18 U.S.C. § 2441, we would expect both

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that one of the conflicts to which the ICJ was addressing itself – "[t]he conflict between the *contras*' forces and those of the Government of Nicaragua" – "was an armed conflict which is 'not of an international character,'" *id.* at 448, ¶ 219, that conflict was recognizably a civil war between a State and an insurgent group, not a conflict between or among violent factions in a territory in which the State had collapsed. Thus there is substantial reason to question the logic and scope of the ICJ's interpretation of common Article 3.

[20] See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 4; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 610.

[21] 143 Cong. Rec. H5865-66 (daily ed. July 28, 1997) (remarks of Rep. Jenkins).

the statutory text and the legislative history to have included some type of clear statement of congressional intent. The WCA regulates the manner in which the U.S. Armed Forces may conduct military operations against the enemy; as such, it potentially comes into conflict with the President's Commander in Chief power under Article II of the Constitution. As we have advised others earlier in this conflict, the Commander in Chief power gives the President the plenary authority in determining how best to deploy troops in the field.[22] Any congressional effort to restrict presidential authority by subjecting the conduct of the U.S. Armed Forces to a broad construction of the Geneva Convention, one that is not clearly borne by its text, would represent a possible infringement on presidential discretion to direct the military. We believe that Congress must state explicitly its intention to take the constitutionally dubious step of restricting the President's plenary power over military operations (including the treatment of prisoners), and that, unless Congress clearly demonstrates such an intent, the WCA must be read to avoid such constitutional problems.[23] As Congress has not signaled such a clear intention in this case, we conclude that common Article 3 should not be read to include all forms of non-international armed conflict.

## II. *Application of WCA and Associated Treaties to al Qaeda*

It is clear from the foregoing that members of the al Qaeda terrorist organization do not receive the protections of the laws of war. Therefore, neither their detention nor their trial by the U.S. Armed Forces is subject to the Geneva Conventions (or the WCA). Three reasons, examined in detail below, support this conclusion. First, al Qaeda's status as a non-State actor renders it ineligible to claim the protections of the Geneva Conventions. Second, the nature of the conflict precludes application of common Article 3 of the Geneva Conventions. Third, al Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under Geneva Convention III.

*Al Qaeda's status as a non-State actor renders it ineligible to claim the protections of the treaties specified by the WCA.* Al Qaeda is not a State. It is a non-governmental terrorist organization composed of members from many nations, with ongoing operations in dozens of nations. Its members seem united in following a radical brand of Islam that seeks to attack Americans throughout the world. Non-governmental organizations cannot be parties to any of the international agreements here governing the laws of war. Al Qaeda is not eligible to sign the Geneva Conventions – and even if it were eligible, it has not done so. Common Article 2, which triggers the Geneva Convention provisions regulating detention conditions and procedures for trial of POWs, is limited only to cases of declared war or armed conflict "between two or more of the High Contracting Parties." Al Qaeda is not a High Contracting Party. As a result, the U.S. military's treatment of al Qaeda members is not governed by the bulk of the Geneva Conventions, specifically those provisions concerning POWs. Conduct towards captured

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[22] Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001).

[23] *Cf. Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989) (construing Federal Advisory Committee Act to avoid encroachment on presidential power); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (stating rule of avoidance); *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 906-11 (D.C. Cir. 1993) (same).

members of al Qaeda, therefore, also cannot constitute a violation of 18 U.S.C. § 2441(c)(1) or § 2441(c)(2).[24]

*Second, the nature of the conflict precludes application of common Article 3 of the Geneva Conventions.* Al Qaeda is not covered by common Article 3, because the current conflict is not covered by the Geneva Conventions. As discussed in Part I, the text of Article 3, when read in harmony with common Article 2, shows that the Geneva Conventions were intended to cover either: a) traditional wars between Nation States (Article 2), or non-international civil wars (Article 3). Our conflict with al Qaeda does not fit into either category. The current conflict is not an international war between Nation States, but rather a conflict between a Nation State and a non-governmental organization. At the same time, the current conflict is not a civil war under Article 3, because it *is* a conflict of "an international character," rather than an internal armed conflict between parties contending for control over a government or territory. Therefore, the military's treatment of al Qaeda members captured in that conflict is

[24] Some difference in the language of the WCA might be thought to throw some doubt on the exact manner in which the statute incorporates these treaty norms. It might be argued, for example, with respect to the Hague Convention IV, that the WCA does not simply incorporate the terms of the treaty itself, with all of their limitations on application, but instead criminalizes the conduct described by that Convention. The argument starts from the fact that there is a textual difference in the way that the WCA references treaty provisions. Section 2441(c)(2) defines as a war crime conduct "prohibited" by the relevant sections of the Hague Convention IV. By contrast, § 2441 (c)(1) makes a war crime any conduct that constitutes a "grave breach" of the Geneva Conventions, and § 2441(c)(3) prohibits conduct "which constitutes a violation" of common Article 3 of the Geneva Convention. It might be argued that this difference indicates that § 2441(c)(2) does not *incorporate* the treaty into federal law; rather, it prohibits the conduct *described by* the treaty. Section 2441(c)(3) prohibits conduct "which constitutes a *violation* of common Article 3" (emphasis added), and that can only be conduct which is a treaty violation. Likewise, § 2441(c)(1) only criminalizes conduct that is a "grave breach" of the Geneva Conventions – which, again, must be a treaty violation. In other words, § 2441(c)(2) might be read to apply even when the Hague Convention IV, by its own terms, would not. On this interpretation, an act could violate § 2441(c)(2), whether or not the Hague Convention IV applied to the specific situation at issue.

We do not think that this interpretation is tenable. To begin with, § 2441(c)(2) makes clear that to be a war crime, conduct must be "*prohibited*" by the Hague Convention IV (emphasis added). Use of the word "prohibited," rather than phrases such as "referred to" or "described," indicates that the treaty must, by its own operation, proscribe the conduct at issue. If the Hague Convention IV does not itself apply to a certain conflict, then it cannot itself proscribe any conduct undertaken as part of that conflict. Thus, the most natural reading of the statutory language is that an individual must violate the Hague Convention IV in order to violate Section 2441(c)(2). Had Congress intended broadly to criminalize the types of conduct proscribed by the relevant Hague Convention IV provisions as such, rather than as treaty violations, it could have done so more clearly. Furthermore, the basic purpose of § 2441 was to implement, by appropriate legislation, the United States' treaty obligations. That purpose would be accomplished by criminalizing acts that were also violations of certain key provisions of the Annex to Hague Convention IV. It would not be served by criminalizing acts *of the kind* condemned by those provisions, whether or not they were treaty violations.

Nothing in the legislative history supports the opposite result. To the contrary, the legislative history suggests an entirely different explanation for the minor variations in language between §§ 2441(c)(1) and 2441(c)(2). As originally enacted, the WCA criminalized violations of the Geneva Conventions. *See* Pub. L. No. 104-192, § 2(a), 110 Stat. 2104, § 2401 (1996). In signing the original legislation, President Clinton urged that it be expanded to include other serious war crimes involving violation of the Hague Conventions IV and the Amended Protocol II. *See* 2 Pub. Papers of William J. Clinton 1323 (1996). The Expanded War Crimes Act of 1997, introduced as H.R. 1348 in the 105th Congress, was designed to meet these requests. Thus, § 2441(c)(2) was added as an amendment at a later time, and was not drafted at the same time and in the same process as § 2441(c)(1).

not limited either by common Article 3 of the Geneva Conventions or 18 U.S.C. § 2441(c)(3), the provision of the WCA incorporating that article.[25]

*Third, al Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under Geneva Convention III.* It might be argued that, even though it is not a State party to the Geneva Convention, al Qaeda could be covered by some protections in Geneva Convention III on the treatment of POWs. Article 4(A)(2) of the Geneva Convention III defines prisoners of war as including not only captured members of the armed forces of a High Contracting Party, but also irregular forces such as "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements." Geneva Convention III, art. 4. Article 4(A)(3) also includes as POWs "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." *Id.* art. 4(A)(3). It might be claimed that the broad terms of these provisions could be stretched to cover al Qaeda.

This view would be mistaken. Article 4 does not expand the application of the Convention beyond the circumstances expressly addressed in common Articles 2 and 3. Unless there is a conflict subject to Article 2 or 3 (the Convention's jurisdictional provisions), Article 4 simply does not apply. As we have argued with respect to Article 3, and shall further argue with respect to Article 2, the conflict in Afghanistan does not fall within either Articles 2 or 3. As a result, Article 4 has no application. In other words, Article 4 cannot be read as an alternative, and far more expansive, statement of the application of the Convention. It merely specifies, where there is a conflict covered by the Convention, who must be accorded POW status.

Even if Article 4, however, were considered somehow to be jurisdictional as well as substantive, captured members of al Qaeda still would not receive the protections accorded to POWs. Article 4(A)(2), for example, further requires that the militia or volunteers fulfill the conditions first established by the Hague Convention IV of 1907 for those who would receive the protections of the laws of war. Hague Convention IV declares that the "laws, rights and duties of war" only apply to armies, militia, and volunteer corps when they fulfill four conditions: command by responsible individuals, wearing insignia, carrying arms openly, and obeying the laws of war. Hague Convention IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277. Al Qaeda members have clearly demonstrated that they will not follow these basic requirements of lawful warfare. They have attacked purely civilian targets of no military value; they refused to wear uniform or insignia or carry arms openly, but instead hijacked civilian airliners, took hostages, and killed them; they have deliberately targeted and killed thousands of civilians; and they themselves do not obey the laws of war concerning the protection of the lives of civilians or the means of legitimate combat. Thus, Article 4(A)(3) is

[25] This understanding is supported by the WCA's legislative history. When extending the WCA to cover violations of common Article 3, the House apparently understood that it was codifying treaty provisions that "forbid atrocities occurring in both civil wars and wars between nations." 143 Cong. Rec. H5865-66 (remarks of Rep. Jenkins). The Senate also understood that "[t]he inclusion of common article 3 of the Geneva Conventions . . . expressly allows the United States to prosecute war crimes perpetrated in noninternational conflicts, such as Bosnia and Rwanda." 143 Cong. Rec. S7544, S7589 (daily ed. July 16, 1997) (remarks of Sen. Leahy). In referring to Bosnia and Rwanda, both civil wars of a non-international character, Senator Leahy appears to have understood common Article 3 as covering only civil wars as well. Thus, Congress apparently believed that the WCA would apply only to traditional international wars between States, or purely internal civil wars.

inapt because al Qaeda do not qualify as "regular armed forces," and its members do not qualify for protection as lawful combatants under the laws of war.

## III. *Application of the Geneva Conventions to the Taliban Militia*

Whether the Geneva Conventions apply to the detention and trial of members of the Taliban militia presents a more difficult legal question. Afghanistan has been a party to all four the Geneva Conventions since September 1956. Some might argue that this requires application of the Geneva Conventions to the present conflict with respect to the Taliban militia, which would then trigger the WCA. This argument depends, however, on the assumptions that during the period in which the Taliban militia was ascendant in Afghanistan, the Taliban was the *de facto* government of that nation, that Afghanistan continued to have the essential attributes of statehood, and that Afghanistan continued in good standing as a party to the treaties that its previous governments had signed.

We think that all of these assumptions are disputable, and indeed false. The weight of informed opinion strongly supports the conclusion that, for the period in question, Afghanistan was a "failed State" whose territory had been largely overrun and held by violence by a militia or faction rather than by a government. Accordingly, Afghanistan was without the attributes of statehood necessary to continue as a party to the Geneva Conventions, and the Taliban militia, like al Qaeda, is therefore not entitled to the protections of the Geneva Conventions. Furthermore, there appears to be substantial evidence that the Taliban was so dominated by al Qaeda and so complicit in its actions and purposes that the Taliban leadership cannot be distinguished from al Qaeda, and accordingly that the Taliban militia cannot stand on a higher footing under the Geneva Conventions.

### *A. Constitutional Authority*

It is clear that, under the Constitution, the Executive has the plenary authority to determine that Afghanistan ceased at relevant times to be an operating State and therefore that members of the Taliban militia were and are not protected by the Geneva Conventions.[26] As an initial matter, Article II makes clear that the President is vested with all of the federal executive power, that he "shall be Commander in Chief," that he shall appoint, with the advice and consent

[26] This is *not* to maintain that Afghanistan ceased to be a State party to the Geneva Conventions merely because it underwent a change of government in 1996, after the military successes of Taliban. The general rule of international law is that treaty relations survive a change of government. *See, e.g.*, 2 Marjorie M. Whiteman, *Digest of International Law* 771-73 (1963); J.L. Brierly, *The Law of Nations* 144-45 (6th ed. 1963); Eleanor C. McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 Am. J. Int'l L. 337 (1977). However, although "[u]nder international law, a change in government alone generally does not alter a state's obligations to honor its treaty commitments . . . [a] different and more difficult question arises . . . when the state itself dissolves." Yoo, *supra* n.17, at 904. Furthermore, we are *not* suggesting that the United States' nonrecognition of the Taliban as the government of Afghanistan in and of itself deprived Afghanistan of party status under the Geneva Conventions. The general rule is that treaties may still be observed even as to State parties, the current governments of which have been unrecognized. *See New York Chinese TV Programs v. U.E. Enterprises*, 954 F.2d 847 (2d Cir.), *cert. denied*, 506 U.S. 827 (1992); *see also Restatement (Third) of the Foreign Relations Law of the United States* at § 202 cmts. a, b; Egon Schwelb, *The Nuclear Test Ban Treaty and International Law*, 58 Am. J. Int'l L. 642, 655 (1964) (quoting statements of President Kennedy and Secretary of State Rusk that participation in a multilateral treaty does not affect recognition status).

of the Senate, and receive, ambassadors, and that he "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const., art. II, § 2, cl. 2. Congress possesses its own specific foreign affairs powers, primarily those of declaring war, raising and funding the military, and regulating international commerce. While Article II, § 1 of the Constitution grants the President an undefined executive power, Article I, § 1 limits Congress to "[a]ll legislative Powers herein granted" in the rest of Article I.

From the very beginnings of the Republic, this constitutional arrangement has been understood to grant the President plenary control over the conduct of foreign relations. As Secretary of State Thomas Jefferson observed during the first Washington Administration: "The constitution has divided the powers of government into three branches [and] . . . has declared that 'the executive powers shall be vested in the President,' submitting only special articles of it to a negative by the senate."[27] Due to this structure, Jefferson continued, "[t]he transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly."[28] In defending President Washington's authority to issue the Neutrality Proclamation, Alexander Hamilton came to the same interpretation of the President's foreign affairs powers. According to Hamilton, Article II "ought . . . to be considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power."[29] As future Chief Justice John Marshall famously declared a few years later, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . The [executive] department . . . is entrusted with the whole foreign intercourse of the nation. . . ."[30] Given the agreement of Jefferson, Hamilton, and Marshall, it has not been difficult for the executive branch consistently to assert the President's plenary authority in foreign affairs ever since.

On the few occasions where it has addressed the question, the Supreme Court has lent its approval to the executive branch's broad powers in the field of foreign affairs. Responsibility for the conduct of foreign affairs and for protecting the national security are, as the Supreme Court has observed, "'central' Presidential domains."[31] The President's constitutional primacy flows from both his unique position in the constitutional structure, and from the specific grants of authority in Article II that make the President both the Chief Executive of the nation and the Commander in Chief.[32] Due to the President's constitutionally superior position, the Supreme Court has consistently "recognized 'the generally accepted view that foreign policy [is] the province and responsibility of the Executive.'"[33] This foreign affairs power is independent of Congress: it is "the very delicate, plenary and exclusive power of the President as sole organ of

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[27] Thomas Jefferson, *Opinion on the Powers of the Senate Respecting Diplomatic Appointments* (1790), *reprinted in* 16 *The Papers of Thomas Jefferson* 378 (Julian P. Boyd ed., 1961).
[28] *Id.* at 379.
[29] Alexander Hamilton, Pacificus No. 1 (1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 39 (Harold C. Syrett et al. eds., 1969).
[30] 10 Annals of Cong. 613-14 (1800).
[31] *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982).
[32] *Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982).
[33] *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)).

the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress."[34]

Part of the President's plenary power over the conduct of the Nation's foreign relations is the interpretation of treaties and of international law. Interpretation of international law includes the determination whether a territory has the necessary political structure to qualify as a Nation State for purposes of treaty implementation. In *Clark v. Allen*, 331 U.S. 503 (1947), for example, the Supreme Court considered whether a 1923 treaty with Germany continued to exist after the defeat, occupation and partition of Germany by the victorious World War II Allies. The Court rejected the argument that the treaty "must be held to have failed to survive the [Second World War], since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community."[35] Instead, the Court held that "the question whether a state is in a position to perform its treaty obligations is essentially a political question. *Terlinden v. Ames*, 184 U.S. 270, 288 [(1902)]. We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligations of either party in respect to them."[36]

Thus, *Clark* demonstrates the Supreme Court's sanction for the Executive's constitutional authority to decide the "political question" whether Germany had ceased to exist as a Nation State and, if so, whether the 1923 treaty with Germany had become inoperative. Equally here, the executive branch should conclude that Afghanistan was not "in a position to perform its treaty obligations" because it lacked, at least throughout the Taliban's ascendancy, all the elements of statehood. If the Executive made such a determination, the Geneva Conventions would be inoperative as to Afghanistan until it was in a position to perform its Convention duties. The federal courts would not review such political questions, but instead would defer to the decision of the Executive.

### *B. Status as a Failed State*

There are ample grounds that demonstrate that Afghanistan was a failed State. Indeed, the findings of the State and Defense Departments, of foreign leaders, and of expert opinion overwhelmingly support such a conclusion.

International law recognizes many situations in which there may be a territory that has no "State." A variety of situations can answer to this description.[37] Of chief relevance here is the

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[34] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[35] *Id.* at 514.

[36] *Id.*; *see also id.* at 508-09 (President might have "formulated a national policy quite inconsistent with the enforcement" of the treaty).

[37] It is entirely possible in international law for a territory (even a populated one) to be without any State. In the *Western Sahara Case*, Advisory Opinion, 1975 I.C.J. 12 (Advisory Opinion May 22, 1975), the General Assembly requested the ICJ to decide the question whether the Western Sahara at the time of Spanish colonization was a territory belonging to no one. The question would have had no meaning unless there could be Stateless territory without a State. *See* D.J. Harris, *Cases and Materials on International Law* 113 (1991). The Transkei, a "homeland" created for the Xhosa people by the Republic of South Africa in 1976, was also a territory not internationally recognized as a State. *See id.* at 110-11.

category of the "failed State." The case of Somalia in 1992, at the time of the United States' intervention, provides a clear example of this category.

A "failed State" is generally characterized by the collapse or near-collapse of State authority. Such collapse is characterized by the inability of central authorities to maintain government institutions, ensure law and order or engage in normal dealings with other governments, and by the prevalence of violence that destabilizes civil society and the economy. The Executive can readily find that at the outset of this conflict, when the country was largely in the hands of the Taliban militia, there was no functioning central government in Afghanistan that was capable of providing the most basic services to the Afghan population, of suppressing endemic internal violence, or of maintaining normal relations with other governments. Afghanistan, consequently, was without the status of a State for purposes of treaty law, and the Taliban militia could not have qualified as the *de facto* government of Afghanistan. Rather, the Taliban militia would have had the status only of a violent faction or movement contending with other factions for control of that country.

We want to make clear that this Office does not have access to all of the facts related to the activities of the Taliban militia and al Qaeda in Afghanistan. Nonetheless, the available facts in the public record support our conclusion that Afghanistan was a failed state – including facts that pre-existed the military reversals suffered by the Taliban militia and the formation of the new transitional government pursuant to the Bonn agreement. Indeed, the departments best positioned to make such a determination appear to have reached that conclusion some time ago. Secretary of Defense Donald Rumsfeld, for example, declared at a November 2, 2001 press conference that the "Taliban is not a government. The government of Afghanistan does not exist today. The Taliban never was a government as such. It was a force in the country that is not substantially weakened – in many cases cloistered away from the people."[38]

The State Department has taken the same view. Near the start of the conflict, the Bureau of South Asian Affairs found that "[t]here is no functioning central government [in Afghanistan]. The country is divided among fighting factions. . . . The Taliban [is] a radical Islamic movement [that] occupies about 90% of the country."[39]

Prominent authorities and experts on Afghan affairs agree that Afghanistan was a failed State. As one leading scholar of international law has written, "[t]he most dramatic examples of the decline in state authority can be found in countries where government and civil order have virtually disappeared. Recent examples are Liberia, Somalia, and Afghanistan. The term 'failed states' has come to be used for these cases and others like them."[40] Lakhdar Brahimi, the United Nations mediator in Afghanistan and a former Algerian Foreign Minister, described Afghanistan

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[38] *Secretary Rumsfeld Media Availability en Route to Moscow* (Nov. 2, 2001), available at http://www.yale.edu/lawweb/avalon/sept_11/dod_brief64.htm (visited Nov. 8, 2001).

[39] *Background Note* (October, 2001), available at http://www.state.gov/r/pa/bgn/index.cfm?docid=5380 (visited Oct. 25, 2001), prepared by the Bureau of South Asian Affairs. *See also* Reuters AlertNet - Afghanistan, *Country Profiles* ("There are no state-constituted armed forces. It is not possible to show how ground forces' equipment has been divided among the different factions."), available at http://www.alertnet.org/thefacts/countryprofiles/152478?version=1 (visited Nov. 1, 2001).

[40] Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 Colum. J. Transnat'l L. 7, 18 (1997).

under the Taliban as a "failed state which looks like an infected wound." Tony Blair, the Prime Minister of Great Britain, on a visit to that country this month, declared that "Afghanistan has been a failed state for too long and the whole world has paid the price."[42]

Traditional legal analysis also makes clear that Afghanistan was a failed State during the period of the Taliban militia's existence. A State has failed when centralized governmental authority has almost completely collapsed, no central authorities are capable of maintaining government institutions or ensuring law and order, and violence has destabilized civil society and the economy.[43] A failed State will not satisfy some or all of the three traditional tests for "statehood" under international law:

i) Does the entity have a defined territory and population?

ii) Are the territory/population under the control of its own government?

iii) Does the entity engage in or have the capacity to engage in formal relations with other States?[44]

In another version of the traditional formulation, the State Department has identified four tests for "statehood":

i) Does the entity have effective control over a clearly defined territory and population?

ii) Is there an organized governmental administration of the territory?

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[41] Ahmed Rashid, Taliban: Militant Islam, Oil & Fundamentalism in Central Asia 207 (2001).

[42] Philip Webster, *Blair's mission to Kabul*, in *The Times of London* (Jan. 8, 2002), 2002 WL 4171996.

[43] "States in which institutions and law and order have totally or partially collapsed under the pressure and amidst the confusion of erupting violence, yet which subsist as a ghostly presence on the world map, are now commonly referred to as 'failed States' or '*États sans gouvernement*.'" Daniel Thurer, *The failed State and International Law*, International Review of the Red Cross No. 836 (Dec. 31, 1999), available at http://www.icrc.org/eng/review (visited Oct. 22, 2001). Somewhat different tests have been used for determining whether a State has "failed." First, the most salient characteristic of a "failed State" seems to be the disappearance of a "central government." Yoram Dinstein, *The Thirteenth Waldemar A. Solf Lecture in International Law*, 166 Mil. L. Rev. 93, 103 (2000); *see also id.* ("All that remains is a multiplicity of groups of irregular combatants fighting each other."). Closely related to this test, but perhaps somewhat broader, is the definition of a "failed State" as "a situation where the government is unable to discharge basic governmental functions with respect to its populace and its territory. Consequently, laws are not made, cases are not decided, order is not preserved and societal cohesion deteriorates. Basic services such as medical care, education, infrastructure maintenance, tax collection and other functions and services rendered by central governing authorities cease to exist or exist only in limited areas." Ruth Gordon, *Growing Constitutions*, 1 U. Pa. J. Const. L. 528, 533-34 (1999). Professor Thurer distinguishes three elements (respectively, territorial, political and functional) said to characterize a "failed State": 1) failed States undergo an "implosion rather than an explosion of the structures of power and authority, the disintegration and destructuring of States rather than their dismemberment;" 2) they experience "the total or near total breakdown of structures guaranteeing law and order;" and 3) there are marked by "the absence of bodies capable, on the one hand, of representing the State at the international level and, on the other, of being influenced by the outside world." Thurer, *supra*.

[44] *See Restatement (Third) of the Foreign Relations Law of the United States*, at § 201; *see also* 1933 Montevideo Convention on Rights and Duties of States, art. I, 49 Stat. 3097, 28 Am. J. Int'l L. Supp. 75 (1934).

iii) Does the entity have the capacity to act effectively to conduct foreign relations and to fulfill international obligations?

iv) Has the international community recognized the entity?[45]

Based on these factors, we conclude that Afghanistan under the Taliban militia was in a condition of "statelessness," and therefore was not a High Contracting Party to the Geneva Conventions for at least that period of time. The condition of having an organized governmental administration was plainly not met. Indeed, there are good reasons to doubt whether *any* of the conditions was met.

First, even before the outset of the conflict with the United States, the Taliban militia did not have effective control over a clearly defined territory and population. Even before the United States air strikes began, at least ten percent of the country, and the population within those areas, was governed by the Northern Alliance. A large part of the Afghan population in recent years has consisted of refugees: as of June, 2001, there were an estimated 2,000,000 Afghan refugees in Pakistan, and as of December, 2000, an estimated 1,500,000 were in Iran.[46] These figures demonstrate that a significant segment of the Afghan population was never under the control of the Taliban militia. It is unclear how strong was the hold of the Taliban militia before the conflict, in light of the rapid military successes of the Northern Alliance in just a few weeks.

Indeed, the facts appear to show that Afghanistan appears to have been divided between different tribal and warring factions, rather than by any central state as such. As we have noted, the State Department has found that Afghanistan was not under the control of a central government, but was instead divided among different warlords and ethnic groups. The Taliban militia in essence represented only an ethnically Pashtun movement, a "tribal militia,"[47] that did not command the allegiance of other major ethnic groups in Afghanistan and that was apparently unable to suppress endemic violence in the country. As a prominent writer on the Taliban militia wrote well before the current conflict began, "[e]ven if [the Taliban] were to conquer the north, it would not bring stability, only continuing guerrilla war by the non-Pashtuns, but this time from bases in Central Asia and Iran which would further destabilize the region."[48]

Second, again even before the United States air strikes and the successes of the Northern Alliance, an organized governmental administration did not exist in Afghanistan. One expert on the Taliban concluded that the country had

> ceased to exist as a viable state and when a state fails civil society is destroyed. . . . The entire Afghan population has been displaced, not once but many times over. The physical destruction of Kabul has turned it into the Dresden of the late twentieth century. . . . There is no semblance of an infrastructure that can sustain

[45] Eleanor C. McDowell, Contemporary Practice of the United States Relating to International Law, 71 Am. J. Int'l L. 337 (1977).

[46] *See* CNN.com /In-Depth Specials, *War Against Terror*, available at http://www.cnn.com/SPECIALS/2001/trade.center/refugee.map.html (visited Nov. 1, 2001). Other estimates are lower but still extremely large numbers. *See, e.g.*, Goodson, *supra*, at 149 (estimating 1.2 million Afghans living in Pakistan).

[47] Goodson, *supra*, at 115.

[48] Rashid, *supra*, at 213.

> society — even at the lowest common denominator of poverty. . . . The economy is a black hole that is sucking in its neighbours with illicit trade and the smuggling of drugs and weapons, undermining them in the process. . . . Complex relationships of power and authority built up over centuries have broken down completely. No single group or leader has the legitimacy to reunite the country. Rather than a national identity or kinship-tribal-based identities, territorial regional identities have become paramount. . . . [T]he Taliban refuse to define the Afghan state they want to constitute and rule over, largely because they have no idea what they want. The lack of a central authority, state organizations, a methodology for command and control and mechanisms which can reflect some level of popular participation . . . make it impossible for many Afghans to accept the Taliban or for the outside world to recognize a Taliban government. . . . No warlord faction has ever felt itself responsible for the civilian population, but the Taliban are incapable of carrying out even the minimum of developmental work because they believe that Islam will take care of everyone.[49]

Another expert reached similar conclusions:

> Afghanistan today has become a violent society, bereft of political institutions that function correctly and an economy that functions at all. When this is coupled with the destruction of population and the physical infrastructure. . ., it becomes clear that Afghanistan is a country on the edge of collapse, or at least profound transformation. . . . With the Taliban, there are few meaningful governmental structures and little that actually functions.[50]

The State Department also came to such conclusions. In testimony early in October 2001 before the Senate Foreign Relations Committee's Subcommittee on Near East and South Asian Affairs, Assistant Secretary of State for South Asian Affairs Christina Rocca explained that:

> [t]wenty-two years of conflict have steadily devastated [Afghanistan], destroyed its physical and political infrastructure, shattered its institutions, and wrecked its socio-economic fabric. . . . The Taliban have shown no desire to provide even the most rudimentary health, education, and other social services expected of any government. Instead, they have chosen to devote their resources to waging war on the Afghan people, and exporting instability to their neighbors.[51]

Rather than performing normal government functions, the Taliban militia exhibited the characteristics of a criminal gang. The United Nations Security Council found that the Taliban militia extracted massive profits from illegal drug trafficking in Afghanistan and subsidized terrorism from those revenues.[52]

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[49] *Id.* at 207-08, 212-13.

[50] Goodson, *supra*, at 103-04; 115.

[51] United States Department of State, International Information Programs, *Rocca Blames Taliban for Humanitarian Disaster in Afghanistan* (Oct. 10, 2001), available at http://www.usinfo.state.gov/regional/nea/sasia/afghan/text/1010roca.htm (visited Oct. 19, 2001).

[52] *See* U.N. Security Council Resolution 1333 (2000), available at http://www.yale.edu/lawweb/avalon/sept_11/unsecres_1333.htm (finding that "the Taliban benefits directly from the cultivation of illicit opium by

Third, the Taliban militia was unable to conduct normal foreign relations or to fulfill its international legal obligations. Indeed, the public record shows that the Taliban militia had become so subject to the domination and control of al Qaeda that it could not pursue independent policies with respect to the outside world.[53] Publicly known facts demonstrate that the Taliban was unwilling and perhaps unable to obey its international obligations and to conduct normal diplomatic relations. Thus, the Taliban has consistently refused to comply with United Nations Security Council Resolutions 1333 (2000) and 1267 (1999), which called on it to surrender Osama bin Laden to justice and to take other actions to abate terrorism based in Afghanistan.[54] Those resolutions also called on all States to deny permission for aircraft to take off or to land if they were owned or operated by or for the Taliban, and to freeze funds and other resources owned or controlled by the Taliban. The Taliban also reportedly refused or was unable to extradite bin Laden at the request of Saudi Arabia in September, 1998, despite close relations between the Saudi government and itself. As a result, the Saudi government expelled the Afghan *chargé d'affaires*.[55] The Taliban's continuing role in sheltering and supporting those believed to be responsible for the terrorist attacks of September 11, 2001 placed it in clear breach of international law, which required it to prevent the use of its territory as a launching pad for attacks against another Nation.[56]

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imposing a tax on its production and indirectly benefits from the processing and trafficking of such opium, and these substantial resources strengthen the Taliban's capacity to harbor terrorists"). The United States Government has amassed substantial evidence that Taliban has condoned and profited from narco-trafficking on a massive scale, with disastrous effects on neighboring countries. *See The Taliban, Terrorism, and Drug Trade*: Hearing Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources of the House Comm. on Government Reform, 107th Cong. (2001) (testimony of William Bach, Director, Office of Asia, Africa, Europe, NIS Programs, Bureau of International Narcotics and Law Enforcement Affairs, Department of State; testimony of Asa Hutchinson, Administrator, Drug Enforcement Administration, U.S. Department of Justice). "The heroin explosion emanating from Afghanistan is now affecting the politics and economies of the entire region. It is crippling societies, distorting the economics of already fragile states and creating a new narco-elite which is at odds with the ever increasing poverty of the population." Rashid, *supra*, at 123; *see also* Goodson, *supra*, at 101-03; Peter Tomsen, *Untying the Afghan Knot*, 25 WTR Fletcher F. World Aff. 17, 18 (2001) ("Afghanistan is now the world's largest producer of opium."). Iran is estimated to have as many as three million drug addicts, largely as a result of Taliban's involvement in the drug trade. Rashid, *supra*, at 122, 203.

[53] *See, e.g.*, "2 U.S. Targets Bound by Fate," *The Washington Post* at A22 (Nov. 14, 2001) ("According to Thomas Gouttierre, an Afghan expert at the University of Nebraska and a former UN adviser, the so-called Afghan Arabs surrounding bin Laden were much more educated and articulate than the often illiterate Taliban and succeeded in convincing them that they were at the head of a world-wide Islamic renaissance. 'Al Qaeda ended up hijacking a large part of the Taliban movement,' he said, noting that [Taliban supreme religious leader Mohammed] Omar and bin Laden were 'very, very tight' by 1998."); "Bin Laden Paid Cash For Taliban," *The Washington Post* at A1 (Nov. 30, 2001) (reporting claims by former Taliban official of al Qaeda's corruption of Taliban officials).

[54] U.N. Security Council Resolution 1333 "strongly condemn[ed]" the Taliban for the "sheltering and training of terrorists and [the] planning of terrorist acts," and "deplor[ed] the fact that the Taliban continues to provide a safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations." U.N. Security Council Resolution 1214, ¶ 13 (1998) enjoined the Taliban to stop providing a sanctuary and training for terrorists. U.N. Security Council Resolution 1267, ¶ 2 (1999), stated that the Taliban's failure to comply with the Council's 1998 demand constituted a threat to the peace. *See* Sean D. Murphy, *Efforts to Obtain Custody of Osama Bin Laden*, 94 Am. J. Int'l L. 366 (2000).

[55] *See* Yossef Bodansky, *Bin Laden: The Man Who Declared War on America* 301-02 (2001).

[56] *See* Robert F. Turner, *International Law and the Use of Force in Response to the World Trade Center and Pentagon Attacks*, available at http://jurist.law.pitt.edu/forumnew/34.htm (visited Oct. 25, 2001) ("If (as has been claimed by the US and UK governments) bin Laden masterminded the attacks on New York and Washington,

Fourth, the Taliban militia was not recognized as the legitimate government of Afghanistan by the United States or by any member of the international community except Pakistan. Neither the United States nor the United Nations ever recognized that the Taliban militia were a government. The only two other States that had maintained diplomatic relations with it before the current conflict began (Saudi Arabia and the United Arab Emirates) soon severed them.[57] Even Pakistan had withdrawn its recognition before the end of hostilities between the United States and the Taliban forces. This *universal* refusal to recognize the Taliban militia as a government demonstrates that other nations and the United Nations concur in our judgment that the Taliban militia was no government and that Afghanistan had ceased to operate as a Nation State.

Based on the foregoing, we conclude that the evidence supports the conclusion that Afghanistan, when largely controlled by the Taliban, failed some, and perhaps all, of the ordinary tests of statehood. Nor do we think that the military successes of the United States and the Northern Alliance change that outcome. Afghanistan *was* stateless for the relevant period of the conflict, even if after the Bonn Agreement it becomes a State recognized by the United Nations, the United States, and most other nations.[58] If Afghanistan was in a condition of statelessness during the time of the conflict, the Taliban militia could not have been considered a government that was also a High Contracting Party to the Geneva Conventions.

The conclusion that members of the Taliban militia are not entitled to the protections accorded to POWs under the Geneva Conventions receives further support from other arguments. As we have already suggested, there is substantial evidence that the Taliban and al Qaeda were so closely intertwined that the Taliban cannot be regarded as an independent actor, and therefore cannot stand on a higher footing under the Geneva Conventions than al Qaeda. Mullah Mohammed Omar, the spiritual leader of the Taliban, appears to have been particularly susceptible to the more sophisticated leadership of al Qaeda, who "introduced him to the world

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Afghanistan is in breach of its state responsibility to take reasonable measures to prevent its territory from being used to launch attacks against other states. The United States and its allies thus have a legal right to violate Afghanistan's territorial integrity to destroy bin Laden and related terrorist targets. If the Taliban elects to join forces with bin Laden, it, too, becomes a lawful target."); *see also* W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. Int'l L. 3, 40-42, 51-54 (1999).

[57] *See "A Look at the Taliban,"* Sept. 30, 2001, available at http://www.usatoday.com/news/world/2001/thetaliban.htm (visited Oct. 19, 2001). Indeed, Pakistan had been the only country in the world that maintained an embassy in Kabul; the overwhelming majority of States and the United Nations recognized exiled President Burhamuddin Rabbani and his government as the country's legal authorities. *See "Taliban tactics move to hostage ploy,"* Aug. 8, 2001, available at http://www.janes.com/regional_news/asia_pacific/news/jid/jid010808_1_n.shtml (visited Oct. 19, 2001).

[58] We do not think that the military successes of the United States and the Northern Alliance necessarily meant that Afghanistan's statehood was restored before the Bonn agreement, if only because the international community, including the United States, did not regard the Northern Alliance as constituting the government of Afghanistan. United Nations Security Council Resolution 1378, ¶ 1 (2001), available at http://www.yale.edu/lawweb/avalon/scpt_11/unsecres_1378.htm (visited Nov. 19, 2001), expressed "strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government" (emphasis added); see also id. ¶ 3 (affirming that the United Nations should play a central role in supporting Afghan efforts to establish a "new and transitional administration leading to the formation of a new government"). The plain implication of this Resolution, which reflects the views of the United States, is that Afghanistan after Taliban did not have a government at that time.

of Islamic radicalism, global jihad and hatred of the United States," who exercised great religious and ideological influence over him, and who furnished him with personal favors such as a bomb-proof house in Kandahar.[59] In particular, Omar, who was born into poverty and was virtually uneducated, seems to have worked closely with Osama bin Laden, who shared with Omar a vision of an international Islamic revolution.[60]

Al Qaeda also provided substantial material assistance to the Taliban militia. It made large sums available to Taliban leaders, and supplied them with "a steady stream of guerrilla fighters to assist the Taliban in their continuing battles with the Northern Alliance."[61] Because the Taliban was not equipped to maintain control over Afghanistan in the face of armed opposition from other factions, the Taliban became increasingly dependent on the money, weapons, recruits, and well-trained soldiers provided to it by al Qaeda. Al Qaeda in turn depended on the Taliban to provide it with bases for training camps and a refuge from the United States. Over the course of his dealings with it, bin Laden "pumped tens of millions of dollars into the Taliban, provided it with his most elite Arab fighting forces, and integrated his Qaeda network into key portfolios within the Taliban government. . . . [T]he two [movements] had long since melded together as one, through money, combat, and a shared radical interpretation of Islam."[62] Further, both because al Qaeda was capable of mustering more formidable military forces than the Taliban at any given point, and because failure to protect bin Laden would have cost the Taliban the support of radical Islamists, it may well have been impossible for the Taliban to surrender bin Laden as directed by the United Nations, even if it had been willing to do.[63] In any event, by continuing to harbor bin Laden and al Qaeda and to assist them in material ways, the Taliban became complicit in its terrorist acts. Taking all these facts into account, together with other non-public information that may be available to the Executive, we think it fair to characterize the Taliban militia as functionally intertwined with al Qaeda, and therefore on the same footing as al Qaeda under the Geneva Conventions.

### *C. Implications Under the Geneva Conventions*

Whether based on the view that Afghanistan was a failed State or on the view that Taliban was functionally indistinguishable from al Qaeda, the view that Afghanistan had ceased to be a party to the Geneva Conventions has two immediate ramifications. First, common Article 2 – and thus most of the substance of the Geneva Conventions – would not apply to the members of the Taliban militia, because that provision only applies to international wars between two State Parties to the Conventions. Second, even common Article 3's basic standards would not apply. This would be so, not only because the current conflict is not a non-international conflict subject to Article 3, but also because common Article 3 concerns only a non-international conflict that occurs "in the territory *of one of the High Contracting Parties*"

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[59] Murray Campbell, *Enigmatic Taliban cleric a poor leader*, The Globe and Mail, at A11 (Dec. 1, 2001).

[60] Indeed, there are press reports (which have also been denied) that a daughter of bin Laden married Omar, and a daughter of Omar married bin Laden.

[61] Michael Dobbs and Vernon Loeb, *supra* note 53.

[62] Michael Kranish and Indira A.R. Lakshmanan, *Partners in 'Jihad': Bin Laden Ties to Taliban: How Odd Alliances Marked Bin Laden's Path*, in *The Boston Globe* (Oct. 28, 2001), 2001 WL 3958881. This article contains especially detailed information about the close linkages between the two movements and their leaders.

[63] Peter McGrath and Gretel Kovach, *Bin Laden's Imprint: an expert on the radical leader says targeting the Saudi dissident won't eliminate his threat*, in *Newsweek* (Sept. 14, 2001), 2001 WL 24138958.

(emphasis added). If Afghanistan was not a High Contracting Party during the time of the conflict, then a non-international conflict within its territory does not fall within the terms of Article 3.

We have considered the argument that, even if our conclusions held during the period when Afghanistan was largely under the Taliban's control (and thus in a condition of statelessness), they have ceased to hold in light of the Bonn Agreement. Afghanistan now has an internationally recognized government, and on that basis it might be argued that it has resumed its status as a High Contracting Party under the Geneva Conventions. It could then be argued that the protections of those Conventions – including the protections for prisoners of war – *now* clothe the Taliban militia, even if they did not during the Taliban's ascendancy.

This reasoning would be mistaken. First, even if Afghanistan now has a recognized government, it does not *necessarily* follow that its status as a party to the Conventions has been completely restored. Afghanistan still may not be in a position to fulfill its Convention responsibilities, and thus should not yet be accorded party status under the Conventions.[64] Thus, even though Germany had some form of government when the Supreme Court decided *Clark v. Allen* in 1947, the Court declared that whether Germany was "in a position to perform its treaty obligations"[65] was a political question, meaning that it remained open for the President to decide whether the treaty with Germany was in effect. We expect that the courts would properly recognize that it rests solely within the President's constitutional authority to determine whether Afghanistan has yet returned to the status of a state party to the Conventions.

Second, the jurisdictional provisions of the Conventions (common Articles 2 and 3) still remain inapplicable to the conflict between the United States and the Taliban militia. This is the case even assuming that, with the substantial cessation of that conflict, the status of Afghanistan as a party to the Conventions has been restored. Article 2 states that the Convention shall apply to all cases of declared war or other armed conflict between the High Contracting Parties. But there was no war or armed conflict between the United States and *Afghanistan* during the period before the Bonn Agreement if Afghanistan was stateless at that time. Nor, of course, is there a state of war or armed conflict between the United States and Afghanistan *now*. Likewise, Article 3 states that certain basic standards shall apply in the case of "an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The most natural reading of this provision is that the conflict must have occurred in the territory of a State that was a High Contracting Party *at the time of the conflict*. So understood, Article 3 would not apply to the conflict with the Taliban.[66] Because the jurisdictional provisions remain inapplicable even if Afghanistan's status as a Convention party has been restored, Taliban prisoners remain outside the protections of the Conventions. As a result, they do not, for example, fall under the definition of "prisoners of war" in Geneva Convention III, art. 4.

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[64] As one expert on Afghanistan has recently noted, "Afghanistan hasn't really had a credible central government since 1973, when the king was ousted. . . . They have been out of practice at seeing themselves as having a central authority of some kind." Kevin Whitelaw et al., *A Hunt in the Hills*, in *U.S. News & World Report* (Dec. 17, 2001), 2001 WL 30366330 (quoting Thomas Gouttierre of the University of Nebraska-Omaha).

[65] 331 U.S. at 514

[66] In addition, as we have noted, Article 3 is and was inapplicable because the conflict in Afghanistan is and was of an international character.

Furthermore, even apart from the question whether Afghanistan was or remains a failed state, there are specific reasons why Geneva Convention III, relating to POWs, would not apply to captured Taliban militia. First, Article 4 of Geneva Convention III enumerates particular categories of persons who are entitled to POW status. In our judgment, Taliban captives do not fall within any of these categories, including that of Article 4(A)(3), "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." As we have discussed, the United Nations and almost all members of the world community, including the United States, refused to recognize the Taliban militia as the government of Afghanistan. Of the handful of States that did recognize it, all but Pakistan withdrew their recognition soon after the start of the conflict, and Pakistan later followed suit. Thus, the Taliban cannot even be considered "a government or authority" at all for purposes of this provision, since no other state in the world viewed the Taliban militia as qualifying as one. According the Taliban militia the status of the armed forces of a government, even when no other country in the world considered it as such, would be tantamount to allowing any political or violent movement to simply declare itself to be a government. Enjoyment of the rights and duties of a sovereign state should not be so easily accorded as by self-identification.

Second, even if a political group or movement could be considered to be "a government or authority" within the meaning of Article 4(A)(3), that group or movement would have to demonstrate that it considered itself bound by Geneva Convention III in order to be in a position to claim the Convention's benefits. Your Department, however, informs us that the Taliban militia failed to confirm its acceptance of the Geneva Conventions, did not fulfill its obligations, and it did not act consistently with the most fundamental obligations of the laws of war, such as the prohibition on using civilians to shield military forces.

Third, even if the Taliban considered themselves to be a party to Geneva Convention III, or even if they had stated publicly that they would comply with that Convention's provisions and in fact did so, Taliban captives would still have to meet other requirements of Article 4 to be entitled to POW status. For example, Article 4(A)(3) only covers "[m]embers of *regular armed forces*" (emphasis added). The Taliban militia, it seems, cannot be so characterized. To be sure, Article 4(A)(2) accords POW status to persons who are not in regular armed forces – *i.e.*, "[m]embers of other militias and members of other voluntary corps, including those of organized resistance movements." Nevertheless, Article 4 makes clear that these combatants are only afforded POW status if they meet certain conditions, including "that of being commanded by a person responsible for his subordinates," "that of having a fixed distinctive sign recognizable at a distance," and "that of conducting their operations in accordance with the laws and customs of war." Your Department advises us that the Taliban militia's command structure probably did not meet the first of these requirements; that the evidence strongly indicates that the requirement of a distinctive uniform was not met; and that the requirement of conducting operations in accordance with the law and customs of armed conflict was not met. Accordingly, we think that Taliban captives do not qualify for POW status either as members of regular armed forces or as combatants of other kinds covered by the Convention.[67]

*D. Historical Application of the Geneva Conventions*

[67] We refrain from discussing more specific facts here due to the sensitive operational nature of such information.

We conclude by addressing a point of considerable significance. To say that the specific provisions of the Geneva and Hague Conventions do not apply in the current conflict with the Taliban militia *as a legal requirement* is by no means to say that the principles of the law of armed conflict cannot be applied *as a matter of U.S. Government policy*. The President as Commander in Chief can determine as a matter of his judgment for the efficient prosecution of the military campaign that the policy of the United States will be to enforce customary standards of the law of war against the Taliban and to punish any transgressions against those standards. Thus, for example, even though Geneva Convention III may not apply, the United States may deem it a violation of the laws and usages of war for Taliban troops to torture any American prisoners whom they may happen to seize. The U.S. military thus could prosecute Taliban militiamen for war crimes for engaging in such conduct.[68] A decision to apply the principles of the Geneva Conventions or of others laws of war as a matter of policy, not law, would be fully consistent with the past practice of the United States.

United States practice in post-1949 conflicts reveals several instances in which our military forces have applied the Geneva Conventions as a matter of policy, without acknowledging any legal obligation to do so. These cases include the Wars in Korea and Vietnam and the interventions in Panama and Somalia.

*Korea*. The Korean War broke out on June 25, 1950, before any of the major State parties to the conflict (including the United States) had ratified the Geneva Conventions. Nonetheless, General Douglas MacArthur, the United Nations Commander in Korea, said that his forces would comply with the principles of the Geneva Conventions, including those relating to POWs. MacArthur stated: "My present instructions are to abide by the humanitarian principles of the 1949 Geneva Conventions, particularly common Article three. In addition, I have directed the forces under my command to abide by the detailed provisions of the prisoner-of-war convention, since I have the means at my disposal to assure compliance with this convention by all concerned and have fully accredited the ICRC delegates accordingly."[69]

*Viet Nam*. The United States through the State Department took the position that the Geneva Convention III "indisputably applies to the armed conflict in Viet Nam," and therefore that "American military personnel captured in the course of that armed conflict are entitled to be treated as prisoners of war."[70] We understand from the Defense Department that our military forces, as a matter of policy, decided at some point in the conflict to accord POW treatment (but not necessarily POW status) to Viet Cong members, despite the fact that they often did *not* meet the criteria for that status (set forth in Geneva Convention III, art. 4), *e.g.*, by not wearing uniforms or any other fixed distinctive signs visible at a distance.

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[68] The President could, of course, also determine that it will be the policy of the United States to require its own troops to adhere to standards of conduct recognized under customary international law, and could prosecute offenders for violations. As explained above, the President is not *bound* to follow these standards by law, but may direct the armed forces to adhere to them as a matter of policy.

[69] Quoted in Joseph P. Bialke, United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict, 50 A.F.L. Rev. 1, 63 n.235 (2001).

[70] *Entitlement of American Military Personnel Held by North Viet-Nam to Treatment as Prisoners of War Under the Geneva Convention of 1949 Relative to the Treatment of Prisoners of War*, July 13, 1966, *reprinted in* John Norton Moore, *Law and the Indo-China War* 635, 639 (1972).

*Panama*. The United States' intervention in Panama on December 20, 1989 came at the request and invitation of Panama's legitimately elected President, Guillermo Endara.[71] The United States had never recognized General Mañuel Noriega, the commander of the Panamanian Defense Force, as Panama's legitimate ruler. Thus, in the view of the executive branch, the conflict was between the Government of Panama assisted by the United States on the one side and insurgent forces loyal to General Noriega on the other. It was not an international armed conflict between the United States and Panama, another State. Accordingly, it was not, in the executive's judgment, an international armed conflict governed by common Article 2 of the Geneva Conventions.[72] Nonetheless, we understand that, as a matter of policy, all persons captured or detained by the United States in the intervention – including civilians and members of paramilitary forces as well as members of the Panamanian Defense Force – were *treated* consistently with the Geneva Convention III, until their precise status under that Convention was determined. A 1990 letter to the Attorney General from the Legal Adviser to the State Department said that "[i]t should be emphasized that the decision to extend basic prisoner of war protections to such persons was based on strong policy considerations, and was not necessarily based on any conclusion that the United States was obligated to do so as a matter of law."[73]

*Interventions in Somalia, Haiti and Bosnia*. There was considerable factual uncertainty whether the United Nations Operation in Somalia in late 1992 and early 1993 rose to the level of an "armed conflict" that could be subject to common Article 3 of the Geneva Conventions, particularly after the United Nations Task Force abandoned its previously neutral role and took military action against a Somali warlord, General Aideed. Similar questions have arisen in other peace operations, including those in Haiti and Bosnia. It appears that the U.S. military has decided, as a matter of policy, to conduct operations in such circumstances as if the Geneva Conventions applied, regardless of whether there is any legal requirement to do so. The U.S.

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[71] *See United States v. Noriega*, 117 F.3d 1206, 1211 (11th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998).

[72] *See* Jan E. Aldykiewicz and Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflict*, 167 Mil. L. Rev. 74, 77 n.6 (2001). In *United States v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992), the district court held that the United States' intervention in Panama in late 1989 was an international armed conflict under (common) Article 2 of the Geneva Convention III, and that General Noriega was entitled to POW status. To the extent that the holding assumed that the courts are free to determine whether a conflict is between the United States and another "State" regardless of the President's view whether the other party is a "State" or not, we disagree with it. By assuming the right to determine that the United States was engaged in an armed conflict with *Panama* – rather than with insurgent forces in rebellion against the recognized and legitimate Government of Panama – the district court impermissibly usurped the recognition power, a constitutional authority reserved to the President. The power to determine whether a foreign government is to be accorded recognition, and the related power to determine whether a condition of statelessness exists in a particular country, are exclusively executive. *See, e.g., Baker v. Carr*, 369 U.S. 186, 212 (1962) ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing.' . . . Similarly, recognition of belligerency abroad is an executive responsibility. . . .") (citation omitted); *Kennett v. Chambers*, 55 U.S. (14 How.) 38, 50-51 (1852) ("[T]he question whether [the Republic of] Texas [while in rebellion against Mexico] had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals . . . were bound to consider . . . Texas as a part of the Mexican territory."); *Mingtai Fire & Marine Ins. Co. v. United Parcel Service*, 177 F.3d 1142, 1145 (9th Cir.) ("[T]he Supreme Court has repeatedly held that the Constitution commits to the Executive branch alone the authority to recognize, and to withdraw recognition from, foreign regimes."), *cert. denied*, 528 U.S. 951 (1999).

[73] Letter for the Hon. Richard L. Thornburgh, Attorney General, from Abraham D. Sofaer, Legal Adviser, State Department at 2 (Jan. 31, 1990).

Army Operational Law Handbook, after noting that "[i]n peace operations, such as those in Somalia, Haiti, and Bosnia, the question frequently arises whether the [law of war] legally applies," states that it is "the position of the US, UN and NATO that their forces will apply the 'principles and spirit' of the [law of war] in these operations."[74]

E. *Suspension of The Geneva Conventions as to Afghanistan*

Even if Afghanistan under the Taliban were not deemed to have been a failed State, the President could still regard the Geneva Conventions as temporarily suspended during the current military action. As a constitutional matter, the President has the power to consider performance of some or all of the obligations of the United States under the Conventions suspended. Such a decision could be based on the finding that Afghanistan lacked the capacity to fulfil its treaty obligations or (if supported by the facts) on the finding that Afghanistan was in material breach of its obligations.

As the Nation's representative in foreign affairs, the President has a variety of constitutional powers with respect to treaties, including the powers to suspend them, withhold performance of them, contravene them or terminate them. The treaty power is fundamentally an executive power established in Article II of the Constitution, and therefore power over treaty matters after advice and consent by the Senate are within the President's plenary authority. We have recently treated these questions in detail, and rely upon that advice here.[75]

The courts have often acknowledged the President's constitutional powers with respect to treaties. Thus, it has long been accepted that the President may determine whether a treaty has lapsed because a foreign State has gained or lost its independence, or because it has undergone other changes in sovereignty.[76] Nonperformance of a particular treaty obligation may, in the President's judgment, justify withholding performance of one of the United States' treaty obligations, or contravening the treaty.[77] Further, the President may regard a treaty as suspended for several reasons. For example, he may determine that "the conditions essential to [the treaty's] continued effectiveness no longer pertain."[78] The President may also determine that a

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[74] *Quoted in* Bialke, *supra*, at 56.

[75] *See* Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001); *see also* Memorandum for William Howard Taft, IV, Legal Adviser, Department of State, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: President's Constitutional Authority to Withdraw Treaties from the Senate* (Aug. 24, 2001).

[76] *See Kennett*, 55 U.S. at 47-48, 51; *Terlinden*, 184 U.S. at 288; *Saroop*, 109 F.3d at 171 (collecting cases). Alexander Hamilton argued in 1793 that the revolution in France had triggered the power (indeed, the duty) of the President to determine whether the pre-existing treaty of alliance with the King of France remained in effect. The President's constitutional powers, he said, "include[] that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to be recognised or not: And where a treaty antecedently exists between the UStates and such nation that right involves the power of giving operation or not to such treaty." Alexander Hamilton, *Pacificus* No. 1 (1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 41 (Harold C. Syrett et al. eds, 1969).

[77] *See Taylor v. Morton*, 23 F. Cas. 784, 787 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, Circuit Justice), *aff'd*, 67 U.S. (2 Black) 481 (1862).

[78] *See International Load Line Convention*, 40 Op. Att'y Gen. 119,124 (1941). Changed conditions have provided a basis on which Presidents have suspended treaties in the past. For example, in 1939, President Franklin Roosevelt

material breach of a treaty by a foreign government has rendered a treaty not merely voidable but void, as to that government.[79]

The President could justifiably exercise his constitutional authority over treaties by regarding the Geneva Conventions as suspended in relation to Afghanistan. The basis for such a determination would be a finding that under the Taliban militia, Afghanistan committed grave violations of international law and maintained close relationships with international terrorist organizations such as al Qaeda, which have attacked wholly civilian targets by surprise attack. As a result, Afghanistan under the Taliban could be held to have violated basic humanitarian duties under the Geneva Conventions and other norms of international law. Nonperformance of such basic duties could be taken to have demonstrated that Afghanistan could not be trusted to perform its commitments under the Conventions during the current conflict.[80] After the conflict, the President determine that relations under the Geneva Conventions with Afghanistan had been restored, once an Afghan government that was willing and able to execute the country's treaty obligations was securely established. Furthermore, if evidence of other material breaches of the Conventions by Afghanistan existed, that evidence could also furnish a basis for the President to decide to suspend performance of the United States' Convention obligations. A decision to regard the Geneva Conventions as suspended would not, of course, constitute a "denunciation" of the Conventions, for which procedures are prescribed in the Conventions.[81] The President need not regard the Conventions as suspended in their entirety, but only in part.[82]

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suspended the operation of the London Naval Treaty of 1936. "The war in Europe had caused several contracting parties to suspend the treaty, for the obvious reason that it was impossible to limit naval armaments. The notice of termination was therefore grounded on changed circumstances." David Gray Adler, *The Constitution and the Termination of Treaties*, 187 (1986).

[79] *See, e.g., Charlton v. Kelly*, 229 U.S. 447, 473 (1913); *Escobedo v. United States*, 623 F.2d 1098, 1106 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980).

[80] It is possible for the President to suspend a multilateral treaty as to one but not all of the parties to the treaty. In 1986, the United States suspended the performance of its obligations under the Security Treaty (ANZUS Pact), T.I.A.S. 2493, 3 U.S.T. 3420, entered into force April 29, 1952, as to New Zealand but not as to Australia. *See* Marian Nash (Leich), 1 *Cumulative Digest of United States Practice in International Law 1981-1988*, at 1279-81.

[81] *See, e.g.*, Geneva Convention III, art. 142. The suspension of a treaty is distinct from the denunciation or termination of one. Suspension is generally a milder measure than termination, often being partial, temporary, or contingent upon circumstances that can be altered by the actions of the parties to the treaty. Moreover, at least in the United States, suspension of a treaty can be reversed by unilateral executive action, whereas termination, which annuls a treaty, and which is therefore more disruptive of international relationships, would require Senate consent to a new treaty in order to be undone. *See* Oliver J. Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 Am. J. Int'l L. 895, 916 (1967) ("It is difficult to see how a right of suspension would present greater dangers than a right of termination.").

[82] In general, the partial suspension of the provisions of a treaty (as distinct from both termination and complete suspension) is recognized as permissible under international law. Article 60 of the Vienna Convention explicitly permits the suspension of a treaty "in whole or in part." "[U]nder both treaty law and non-forcible reprisal law as a basis for responsive suspension it is clear that suspension may be only partial and need not suspend or terminate an agreement as a whole, in contrast, for example, with treaty withdrawal clauses." John Norton Moore, *Enhancing Compliance With International Law: A Neglected Remedy*, 39 Va. J. Int'l L. 881, 932 (1999). Although suspension of particular treaty provisions is recognized both in State practice and international law, we are not aware of any precedent for suspending a treaty as to *some*, but not *others*, of the persons otherwise protected by it. Thus, we can see no basis for suggesting that the President might suspend the Geneva Conventions as to the Taliban *leadership*, but not as to its rank and file members. However, the President could achieve the same outcome by suspending the Conventions, ordering the U.S. military to follow them purely as a matter of policy, and excepting the Taliban leadership from the coverage of this policy.

Although the United States has never, to our knowledge, suspended any provision of the Geneva Conventions, it is significant that on at least two occasions since 1949 – the Korean War and the Persian Gulf War – its practice has deviated from the clear requirements of Article 118 of Geneva Convention III. That Article prescribes the mandatory repatriation of POWs after the cessation of a covered conflict.[83] Although on both occasions the POWs themselves sought to avoid repatriation, Geneva Convention III provides that a POW may "in no circumstances renounce in part or in entirety" the right to repatriation. Moreover, the negotiating history of the Convention reveals that a proposal to make POW repatriation voluntary was considered and rejected, in large part on the ground that it would work to the detriment of the POWs.[84] Consequently, withholding of repatriation, even with the consent of the POWs, represented a deviation from the Convention's strict norms.

*Korea*. The Korean War broke out on June 25, 1950, before any of the major State parties to the conflict (including the United States) had ratified the Geneva Conventions. Nonetheless, the principle of repatriation of POWs had long been rooted in treaty and customary international law, including Article 20 of the Annex to Hague Convention IV, which states that "[a]fter the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible."[85] Large numbers of Chinese and North Korean POWs held by the United Nations did not wish to be repatriated, however, and special provisions for them (and for a small number of United Nations POWs in Communist hands) were made under the Armistice of July 27, 1953. "To supervise the repatriation, the armistice created a Neutral Nations Repatriation Commission, composed of representatives from Sweden, Switzerland, Poland, Czechoslovakia, and India. Within sixty days of signing the Armistice, prisoners who desired repatriation were to be directly repatriated in groups to the side to which they belonged at the time of their capture. Those prisoners not so repatriated were to be released to the Neutral Nations Repatriation Commission . . . for further disposition."[86] Altogether approximately 23,000 POWs refused repatriation. The majority (not quite 22,000) eventually went to Taiwan.[87]

*The Persian Gulf War*. At the cessation of hostilities in the Persian Gulf War, some 13,418 Iraqi POWs held by Allied forces were unwilling to be repatriated for fear of suffering punishment from their government for having surrendered. Notwithstanding the repatriation mandate of Geneva Convention III, the United States and its Allies executed an agreement with

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[83] Article 118 states in relevant part:

> Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.
>
> In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity the principle laid down in the foregoing paragraph.

[84] *See* Howard S. Levie, *The Korean Armistice Agreement and Its Aftermath*, 41 Naval L. Rev. 115, 125-27(1993).

[85] *See generally* 3 Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, ¶ 674 at 1858-59 (2d ed. 1945).

[86] David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 Va. J. Int'l L. 801, 883 (1996).

[87] *Id.* at 885.

Iraq providing for only voluntary repatriation through a program administered by the International Committee of the Red Cross.[88]

F. *Suspension Under International Law*

Although the United States may determine either that Afghanistan was a failed State that could not be considered a party to the Geneva Conventions, or that the Geneva Conventions should otherwise be regarded as suspended under the present circumstances, there remains the distinct question whether such determinations would be valid as a matter of international law.[89] We emphasize that the resolution of that question, however, *has no bearing* on domestic constitutional issues, or on the application of the WCA. Rather, these issues are worth consideration as a means of justifying the actions of the United States in the world of international politics. While a close question, we believe that the better view is that, in certain circumstances, countries can suspend the Geneva Conventions consistently with international law.

International law has long recognized that the material breach of a treaty can be grounds for the party injured by the breach to terminate or withdraw from the treaty.[90] Under customary international law, the general rule is that breach of a multilateral treaty by a State Party justifies the suspension of that treaty with regard to that State. "A material breach of a multilateral treaty by one of the parties entitles . . . [a] party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State."[91] Assuming that Afghanistan could have been found to be in material breach for having violated "a provision essential to the accomplishment of the object or purpose of the [Geneva Conventions]," suspension of the Conventions would have been justified.[92]

We note, however, that these general rules authorizing suspension "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."[93] Although the United States is not a party to the Vienna Convention, some

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[88] *See id.* at 931 & n.633.

[89] In general, of course, a decision by a State not to discharge its treaty obligations, even when effective as a matter of domestic law, does not necessarily relieve it of possible international liability for non-performance. *See generally Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934).

[90] *See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16, 47 ¶ 98 (Advisory Opinion June 21, 1971) (holding it to be a "general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character. . . . The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law[.]").

[91] Vienna Convention on Treaties art. 60(2)(b).

[92] *Id.* art. 60(3).

[93] *Id.* art. 60(5). The Vienna Convention seems to prohibit or restrict the suspension of humanitarian treaties if the sole ground for suspension is material breach. It does not squarely address the case in which suspension is based, not on particular breaches by a party, but by the party's disappearance as a State or on its incapacity to perform its treaty obligations.

lower courts have said that the Convention embodies the customary international law [illegible] and the State Department has at various times taken the same view.[94] The Geneva Conventions must be regarded as "treaties of a humanitarian character," many of whose provisions "are built up the protection of the human person."[95] Arguably, therefore, a determination by the United States that the Geneva Conventions were inoperative as to Afghanistan or a decision to regard them as suspended, might put the United States in breach of customary international law.

In addition, the Geneva Conventions could themselves be read to preclude suspension. Common Article 1 pledges the High Contracting Parties "to respect and to ensure respect for the present Convention *in all circumstances*" (emphasis added). Some commentators argue that this provision should be read to bar any State party from refusing to enforce their provisions, no matter the conduct of its adversaries. In other words, the duty of performance is absolute and does not depend upon reciprocal performance by other State parties.[96] Under this approach, the substantive terms of the Geneva Conventions could never be suspended, and thus any violation would always be illegal under international law.

This understanding of the Vienna and Geneva Conventions cannot be correct. There is no textual provision in the Geneva Conventions that clearly prohibits temporary suspension. The drafters included a provision that appears to preclude State parties from agreeing to absolve each other of violations.[97] They also included careful procedures for the termination of the agreements by individual State parties, including a provision that requires delay of a termination of a treaty, if that termination were to occur during a conflict, until the end of the conflict.[98] Yet, at the same time, the drafters of the Conventions did not address suspension at all, even though it has been a possible option since at least the eighteenth century.[99] Applying the canon of interpretation *expressio unius est exclusio alterius*, that the inclusion of one thing implies the exclusion of the other, we should presume that the State parties did not intend to preclude suspension. Indeed, if the drafters and ratifiers of the Geneva Conventions believed the treaties could not be suspended, while allowing for withdrawal and denunciation, they could have said so explicitly and easily in the text.

The text of the Conventions also makes it implausible to claim that *all* obligations imposed by the Geneva Conventions are absolute and that non-performance is *never* excusable. To begin with, the Conventions themselves distinguish "grave" breaches from others. They further provide that "[n]o High Contracting Party shall be allowed to absolve itself . . . of any liability incurred by itself . . . in respect of [grave] breaches."[100] If all of the obligations imposed

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[94] *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), *cert. denied*, 122 S. Ct. 206 (2001); Moore, *supra*, at 891-92 (quoting 1971 statement by Secretary of State William P. Rogers and 1986 testimony by Deputy Legal Adviser Mary V. Mochary).

[95] *See* Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* 191 (2d ed. 1984) (explaining intent and scope of reference to "humanitarian" treaties). Indeed, when the drafters of the Vienna Convention added paragraph 5 to article 60, the Geneva Conventions were specifically mentioned as coming within it. *See* Harris, *supra* n.19, at 797.

[96] *See, e.g.*, Draper, *The Red Cross Conventions*, *supra*, at 8; *see also Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, 76 I.L.R. at 448, ¶ 220.

[97] *See, e.g.*, Geneva Convention III, art. 131.

[98] *See, e.g., id.*, art. 142.

[99] *See* Sinclair, *supra*, at 192.

[100] Geneva Convention IV, art. 148.

by the Conventions were absolute and unqualified, it would serve [illegible] "grave" breaches from others, or to provide explicitly that no party could absolve itself from liability for grave breaches. Furthermore, although specific provisions of the Conventions rule out "reprisals" of particular kinds,[101] they do not rule out reprisals as such. Thus, Article 13 of Geneva Convention III, while defining certain misconduct with respect to prisoners of war as constituting a "serious breach" of the Convention, also states categorically that "[m]easures of reprisal *against prisoners of war* are prohibited." (emphasis added). Similarly, Article 60(5) of the Vienna Convention on Treaties states that the usual rules permitting treaty suspension in some instances "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals *against persons protected by such treaties*" (emphasis added). That provision seems to be an implicit prohibition only of a particular class of reprisals, not of all reprisals. Accordingly, it appears to be permissible, as a matter both of treaty law and of customary international law, to suspend performance of Geneva Convention obligations on a temporary basis. It also appears permissible to engage in reprisals in response to material breaches by an enemy, provided that the reprisals do not give rise to "grave" breaches or to reprisals against protected persons.

Finally, a blanket non-suspension rule makes little sense as a matter of international law and politics. If there were such a rule, international law would leave an injured party effectively remediless if its adversaries committed material breaches of the Geneva Conventions. Apart from its unfairness, that result would reward and encourage non-compliance with the Conventions. True, the Conventions appear to contemplate that enforcement will be promoted by voluntary action of the parties.[102] Furthermore, the Conventions provide for intervention by "the International Committee of the Red Cross or any other impartial humanitarian organization . . . subject to the consent of the Parties to the conflict concerned."[103] But the effectiveness of these provisions depends on the good will of the very party assumed to be committing material breaches, or on its sensitivity to international opinion. Likewise, the provision authorizing an impartial investigation of alleged violations also hinges on the willingness of a breaching party to permit the investigation and to abide by its result. Other conceivable remedies, such as the imposition of an embargo by the United Nations on the breaching party, may also be inefficacious in particular circumstances. If, for example, Afghanistan were bound by Geneva Convention III to provide certain treatment to United States prisoners of war but in fact materially breached such duties, a United Nations embargo might have little effect on its behavior. Finally, offenders undoubtedly face a risk of trial and punishment before national or international courts after the conflict is over. Yet that form of relief presupposes that the

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[101] U.S. Army, *The Law of Land Warfare, Field Manual No. 27-10* (July 18, 1956), (the "FM 27-10"), defines "reprisals" as "acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare. For example, the employment by a belligerent of a weapon the use of which is normally precluded by the law of war would constitute a lawful reprisal for intentional mistreatment of prisoners of war held by the enemy." *Id.*, ch. 8, ¶ 497(a). In general, international law disfavors and discourages reprisals. *See id.* ¶ 497(d). ("Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from unlawful practices.") They are permitted, however, in certain specific circumstances.

[102] *See, e.g.*, the Geneva Convention III, art. 8; Geneva Convention IV, art. 9.

[103] Geneva Convention III, art. 9; Geneva Convention IV, art. 10.

offenders will be subject to capture at the end of the conflict – which may well depend on whether or not they have been defeated. Reliance on post-conflict trials, as well as being uncertain, defers relief for the duration of the conflict. Without a power to suspend, therefore, parties to the Geneva Conventions would only be left with these meager tools to remedy widespread violation of the Conventions by others.

Thus, even if one were to believe that international law set out fixed and binding rules concerning the power of suspension, the United States could make convincing arguments under the Geneva Conventions itself, the Vienna Convention on Treaties, and customary international law in favor of suspending the Geneva Conventions as applied to the Taliban militia in the current war in Afghanistan.

## IV. *The Customary International Laws of War*

So far, this memorandum has addressed the issue whether the Geneva Conventions, and the WCA, apply to the detention and trial of al Qaeda and Taliban militia members taken prisoner in Afghanistan. Having concluded that these laws do not apply, we turn to your question concerning the effect, if any, of customary international law. Some may take the view that even if the Geneva Conventions, by their terms, do not govern the conflict in Afghanistan, the substance of these agreements has received such universal approval that it has risen to the status of customary international law. Regardless of its substance, however, customary international law cannot bind the executive branch under the Constitution because it is not federal law. This is a view that this Office has expressed before,[104] and is one consistent with the views of the federal courts,[105] and with executive branch arguments in the courts.[106] As a result, any customary international law of armed conflict in no way binds, as a legal matter, the President or the U.S. Armed Forces concerning the detention or trial of members of al Qaeda and the Taliban.

### A. *Is Customary International Law Federal Law?*

Under the view promoted by many international law academics, any presidential violation of customary international law is presumptively unconstitutional.[107] These scholars argue that customary international law is federal law, and that the President's Article II duty under the Take Care Clause requires him to execute customary international law as well as statutes lawfully enacted under the Constitution. A President may not violate customary international law, therefore, just as he cannot violate a statute, unless he believes it to be unconstitutional. Relying upon cases such as *The Paquete Habana*, 175 U.S. 677, 700 (1900), in

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[104] *See Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163 (1989).

[105] *See, e.g., United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

[106] *See, id.* at 669-70; *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935-36 (D.C. Cir. 1988); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986).

[107] See, e.g., Michael J. Glennon, Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?, 80 NW. U. L. REV. 321, 325 (1985); Louis Henkin, International Law As Law in the United States, 82 MICH. L. REV. 1555, 1567 (1984); Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 VA. L. REV. 1071, 1179 (1985); see also Jonathan R. Charney, Agora: May the President Violate Customary International Law?, 80 AM. J. INT'L L. 913 (1986).

which the Supreme Court observed that "international law is part of our law," this position often claims that the federal judiciary has the authority to invalidate executive action that runs counter to customary international law.[108]

This view of customary international law is seriously mistaken. The constitutional text nowhere brackets presidential or federal power within the confines of international law. When the Supremacy Clause discusses the sources of federal law, it enumerates only "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States." U.S. Const. art. VI. International law is nowhere mentioned in the Constitution as an independent source of federal law or as a constraint on the political branches of government. Indeed, if it were, there would have been no need to grant to Congress the power to "define and punish . . . Offenses against the Law of Nations."[109] It is also clear that the original understanding of the Framers was that "Laws of the United States" did *not* include the law of nations, as international law was called in the late eighteenth century. In explaining the jurisdiction of the Article III courts to cases arising "under the Constitution and the Laws of the United States," for example, Alexander Hamilton did not include the law of nations as a source of jurisdiction.[110] Rather, Hamilton pointed out, claims involving the laws of nations would arise either in diversity cases or maritime cases,[111] which by definition do not involve "the Laws of the United States." Little evidence exists that those who attended the Philadelphia Convention in the summer of 1787 or the state ratifying conventions believed that federal law would have included customary international law, but rather that the law of nations was part of a general common law that was not true federal law.[112]

Indeed, allowing customary international law to rise to the level of federal law would create severe distortions in the structure of the Constitution. Incorporation of customary international law directly into federal law would bypass the delicate procedures established by

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[108] Recently, the status of customary international law within the federal legal system has been the subject of sustained debate with legal academia. The legitimacy of incorporating customary international law as federal law has been subjected in these exchanges to crippling doubts. See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law As Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 817 (1997); see also Phillip R. Trimble, A Revisionist View of Customary International Law, 33 UCLA L. Rev. 665, 672-673 (1986); Arthur M. Weisburd, The Executive Branch and International Law, 41 Vand. L. Rev. 1205, 1269 (1988). These claims have not gone unchallenged. Harold H. Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824, 1827 (1998); Gerald L. Neuman, Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith, 66 Fordham L. Rev. 371, 371 (1997); Beth Stephens, The Law of Our Land: Customary International Law As Federal Law After Erie, 66 Fordham L. Rev. 393, 396-97 (1997). Bradley and Goldsmith have responded to their critics several times. See Curtis A. Bradley & Jack L. Goldsmith, Federal Courts and the Incorporation of International Law, 111 Harv. L. Rev. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham L. Rev. 319, 330 (1997).

[109] U.S. Const. art. I, § 8.

[110] *The Federalist No. 80*, at 447-49 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

[111] *Id.* at 444-46.

[112] See, e.g., Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand. L. Rev. 819, 830-37 (1989); Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1306-12 (1996); Curtis A. Bradley & Jack L. Goldsmith, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham L. Rev. 319, 333-36 (1997).

the Constitution for amending the Constitution or for enacting legislation. Because customary international law is not approved by two-thirds of Congress and three-quarters of the state legislatures, it has not been passed by both houses of Congress and signed by the President, nor is it made by the President with the advice and consent of two-thirds of the Senate. In other words, customary international law has not undergone the difficult hurdles that stand before enactment of constitutional amendments, statutes, or treaties. As such, it can have no legal effect on the government or on American citizens because it is not law.[114] Even the inclusion of treaties in the Supremacy Clause does not render treaties automatically self-executing in federal court, not to mention self-executing against the executive branch.[115] If even treaties that have undergone presidential signature and senatorial advice and consent can have no binding legal effect in the United States, then it certainly must be the case that a source of rules that never undergoes any process established by our Constitution cannot be law.[116]

It is well accepted that the political branches have ample authority to override customary international law within their respective spheres of authority. This has been recognized by the Supreme Court since the earliest days of the Republic. In *The Schooner Exchange v. McFaddon*,[7] for example, Chief Justice Marshall applied customary international law to the seizure of a French warship only because the United States government had not chosen a different rule.

> It seems then to the Court, to be a principle of public [international] law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction. Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals.[117]

In *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), Chief Justice Marshall again stated that customary international law "is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded."[118] In twenty-first century words, overriding customary international law may prove to be a bad idea, or be subject to criticism, but there is no doubt that the government has the power to do it.

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[113] *Cf. INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto for failure to undergo bicameralism and presentment as required by Article I, Section 8 for all legislation).

[114] In fact, allowing customary international law to bear the force of federal law would create significant problems under the Appointments Clause and the non-delegation doctrine, as it would be law made completely outside the American legal system through a process of international practice, rather than either the legislature or officers of the United States authorized to do so.

[115] *See, e.g., Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

[116] See John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955 (1999) (non-self-execution of treaties justified by the original understanding); John C. Yoo, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution, 99 Colum. L. Rev. 2218 (1999) (demonstrating that constitutional text and structure require implementation of treaty obligations by federal statute).

[117] 11 U.S. (7 Cranch) 116, 145-46 (1812) (emphasis added).

[118] *Id.* at 128.

Indeed, proponents of the notion that customary international law is [illegible] little support in either history or Supreme Court case law. It is true that in some contexts, mostly involving maritime, insurance, and commercial law, the federal courts in the nineteenth century looked to customary international law as a guide.[119] Upon closer examination of these cases, however, it is clear that customary international law had the status only of the general federal common law that was applied in federal diversity cases under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). As such, it was not considered true federal law under the Supremacy Clause, it did not support Article III "arising under" jurisdiction; it did not pre-empt inconsistent state law, and it did not bind the executive branch. Indeed, even during this period, the Supreme Court acknowledged that the laws of war did not qualify as true federal law and could not therefore serve as the basis for federal subject matter jurisdiction. In *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, for example, the Supreme Court declared that it had no jurisdiction to review "the general laws of war, as recognized by the law of nations applicable to this case," because such laws do not involve the constitution, laws, treaties, or executive proclamations of the United States.[120] The spurious nature of this type of law led the Supreme Court in the famous case of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), to eliminate general federal common law.

Even the case most relied upon by proponents of customary international law's status as federal law, *The Paquete Habana*, itself acknowledges that customary international law is subject to override by the action of the political branches. *The Paquete Habana* involved the question whether U.S. armed vessels in wartime could capture certain fishing vessels belonging to enemy nationals and sell them as prize. In that case, the Court applied an international law rule, and did indeed say that "international law is part of our law."[121] But Justice Gray then continued, "*where there is no treaty and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations." In other words, while it was willing to apply customary international law as general federal common law (this was the era of *Swift v. Tyson*), the Court also readily acknowledged that the political branches and even the federal judiciary could override it at any time. No Supreme Court decision in modern times has challenged that view.[122] Thus, under clear Supreme Court precedent, any

[119] See, e.g., Oliver Am. Trading Co. v. Mexico, 264 U.S. 440, 442-43 (1924); Huntington v. Attrill, 146 U.S. 657, 683 (1892); New York Life Ins. Co. v. Hendren, 92 U.S. 286, 286-87 (1875).

[120] 92 U.S. 286, 286-87.

[121] *Id.* at 700.

[122] Two lines of cases are often cited for the proposition that the Supreme Court has found customary international law to be federal law. The first, which derives from Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). The "Charming Betsy" rule, as it is sometimes known, is a rule of construction that a statute should be construed when possible so as not to conflict with international law. This rule, however, does not apply international law of its own force, but instead can be seen as measure of judicial restraint that violating international law is a decision for the political branches to make, and that if they wish to do so, they should state clearly their intentions. The second, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, applied the "act of state" doctrine, which generally precludes courts from examining the validity of the decisions of foreign governments taken on their own soil, as federal common law to a suit over expropriations by the Cuban government. As with Charming Betsy, however, the Court developed this rule as one of judicial self-restraint to preserve the flexibility of the political branches to decide how to conduct foreign policy.

Some supporters of customary international law as federal law rely on a third line of cases, beginning with Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). In Filártiga, the Second Circuit read the federal Alien Tort Statute, 28 U.S.C. §1350 (1994), to allow a tort suit in federal court against the former official of a foreign government for violating norms of international human rights law, namely torture. Incorporation of customary international law via the Alien Tort Statute, while accepted by several circuit courts, has never received the blessings of the Supreme

presidential decision in the current conflict concerning the detention [redacted] Taliban militia prisoners would constitute a "controlling" executive act that would [redacted] and completely override any customary international law norms.

Constitutional text and Supreme Court decisions aside, allowing the [redacted] upon international law to restrict the President's discretion to conduct war would raise deep structural problems. First, if customary international law is indeed federal law, then it must receive all of the benefits of the Supremacy Clause. Therefore, customary international law would not only bind the President, but it also would pre-empt state law and even supersede inconsistent federal statutes and treaties that were enacted before the rule of customary international law came into being. This has never happened. Indeed, giving customary international law this power not only runs counter to the Supreme Court cases described above, but would have the effect of importing a body of law to restrain the three branches of American government that never underwent any approval by our democratic political process. If customary international law does not have these effects, as the constitutional text, practice and most sensible readings of the Constitution indicate, then it cannot be true federal law under the Supremacy Clause. As non-federal law, then, customary international law cannot bind the President or the executive branch, in any legally meaningful way, in its conduct of the war in Afghanistan.

Second, relying upon customary international law here would undermine the President's control over foreign relations and his Commander in Chief authority. As we have noted, the President under the Constitution is given plenary authority over the conduct of the Nation's foreign relations and over the use of the military. Importing customary international law notions concerning armed conflict would represent a direct infringement on the President's discretion as the Commander in Chief and Chief Executive to determine how best to conduct the Nation's military affairs. Presidents and courts have agreed that the President enjoys the fullest discretion permitted by the Constitution in commanding troops in the field.[123] It is difficult to see what legal authority under our constitutional system would permit customary international law to restrict the exercise of the President's plenary power in this area, which is granted to him directly by the Constitution. Further, reading customary international law to be federal law would improperly inhibit the President's role as the representative of the Nation in its foreign affairs.[124] Customary law is not static; it evolves through a dynamic process of State custom and practice. "States necessarily must have the authority to contravene international norms, however, for it is

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Court and has been sharply criticized by some circuits, see, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-10 (D.C. Cir.1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985), as well as by academics, see Curtis A. Bradley & Jack L. Goldsmith, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham L. Rev. 319, 330 (1997).

[123] *See* Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) (reviewing authorities).

[124] "When articulating principles of international law in its relations with other states, the Executive branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns." Sabbatino, 376 U.S. at 432-33. See also Rappenecker v. United States, 509 F.Supp. 1024, 1029 (N.D. Cal. 1980) ("Under the doctrine of separation of powers, the making of those determinations [under international law] is entrusted to the President."); International Load line Convention, 40 Op. Att'y Gen. at 123-24 (President "speak[s] for the nation" in making determination under international law).

the process of changing state practice that allows customary international law [illegible] we observed in 1989, "[i]f the United States is to participate in the evolution of international law, the Executive must have the power to act inconsistently with international law where necessary."[126] The power to override or ignore customary international law, even the law applying to armed conflict, is "an integral part of the President's foreign affairs power."[127]

Third, if customary international law is truly federal law, it presumably must be enforceable by the federal courts. Allowing international law to interfere with the President's war power in this way, however, would expand the federal judiciary's authority into areas where it has little competence, where the Constitution does not textually call for its intervention, and where it risks defiance by the political branches. Indeed, treating customary international law as federal law would require the judiciary to intervene into the most deeply political questions, those concerning war. This the federal courts have said they will not do, most notably during the Kosovo conflict.[128] Again, the practice of the branches demonstrates that they do not consider customary international law to be federal law. This position makes sense even at the level of democratic theory, because conceiving of international law as a restraint on warmaking would allow norms of questionable democratic origin to constrain actions validly taken under the U.S. Constitution by popularly accountable national representatives.

Based on these considerations of constitutional text, structure, and history, we conclude that any customary rules of international law that apply to armed conflicts do not bind the President or the U.S. Armed Forces in their conduct of the war in Afghanistan.

B. *Do the Customary Laws of War Apply to al Qaeda or the Taliban Militia?*

Although customary international law does not bind the President, the President may still use his constitutional warmaking authority to subject members of al Qaeda or the Taliban militia to the laws of war. While this result may seem at first glance to be counter-intuitive, it is a product of the President's Commander in Chief and Chief Executive powers to prosecute the war effectively.

The President has the legal and constitutional authority to subject both al Qaeda and Taliban to the laws of war, and to try their members before military courts or commissions instituted under Title 10 of the United States Code, if he so chooses. Section 818 of title 10 provides in part that "[g]eneral courts-martial . . . have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war" (except for capital punishment in certain cases). Section 821 allows for the trial "offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." We have described the jurisdiction and usage of military tribunals for you in a separate memorandum. We do not believe that these courts would lose jurisdiction to try members of al Qaeda or the Taliban militia for violations of the laws of

[125] 13 Op. O.L.C. at 170.
[126] *Id.*
[127] *Id.* at 171.
[128] *See, e.g., Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000).

war, even though we have concluded that the laws of war have no binding effect [illegible] – on the President.

This is so because the extension of the common laws of war to the present conflict is, in essence, a *military* measure that the President can order as Commander in Chief. As the Supreme Court has recognized, "an important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."[129] In another case, the Court observed that, "[i]n the absence of attempts by Congress to limit the President's power, it appears that as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States."[130] Thus, pursuant to his Commander in Chief authority, the President could impose the laws of war on members of al Qaeda and the Taliban militia as part of the measures necessary to prosecute the war successfully.

Moreover, the President's general authority over the conduct of foreign relations entails the specific power to express the views of the United States both on the content of international law generally and on the application of international law to specific facts. "When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns."[131] Thus, the President can properly find the unprecedented conflict between the United States and transnational terrorist organizations a "war" for the purposes of the customary or common laws of war. Certainly, given the extent of hostilities both in the United States and Afghanistan since the September 11 attacks on the World Trade Center and the Pentagon, the scale of the military, diplomatic and financial commitments by the United States and its allies to counter the terrorist threats, and the expected duration of the conflict, it would be entirely reasonable for the President to find that a condition of "war" existed for purposes of triggering application of the common laws of war. He could also reasonably find that al Qaeda, the Taliban militia, and other related entities that are engaged in conflict with the United States were subject to the duties imposed by those laws. Even if members of these groups and organizations were considered to be merely "private" actors, they could nonetheless be held subject to the laws of war.[132]

In addition, Congress has delegated to the President sweeping authority with respect to the present conflict, and especially with regard to those organizations and individuals implicated

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[129] *See Ex parte Quirin*, 317 U.S. 1, 28-29 (1942); *cf. Hirota v. Mac Arthur*, 338 U.S. 197, 208 (1948) (Douglas, J., concurring) (Agreement with Allies to establish international tribunals to try accused war criminals who were enemy officials or armed service members was "a part of the prosecution of the war. It is a furtherance of the hostilities directed to a dilution of enemy power and involving retribution for wrongs done.").

[130] *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952).

[131] *Sabbatino*, 376 U.S. at 432-33.

[132] *See Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir.) ("The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II . . . and remains today an important aspect of international law."), *cert. denied*, 518 U.S. 1005 (1996).

in the terrorist attacks of September 11, 2001. In the wake of those incidents, Congress enacted Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress found that "on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens" which render it both necessary and appropriate that the United States exercise its rights to defend itself and to protect United States citizens both at home and abroad, and that "such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." Section 2 of the statute authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Read together with the President's constitutional authorities as Commander in Chief and as interpreter of international law, this authorization allows the President to subject members of al Qaeda, the Taliban militia, and other affiliated groups to trial and punishment for violations of the common laws of war, if the President determines that it would further the conduct of military operations or contribute to the defense and security of the United States and its citizens. 2042

*C. May a U.S. Servicemember be Tried for Violations of the Laws of War?*

You have also asked whether the laws of war, as incorporated by reference in title 10, also apply to United States military personnel engaged in armed conflict with al Qaeda or with the Taliban militia. Even though the customary laws of war do not bind the President as federal law, the President may wish to extend some or all of such laws to the conduct of United States military operations in this conflict, or to the treatment of members of al Qaeda or the Taliban captured in the conflict. It is within his constitutional authority as Commander in Chief to do so. The common laws of war can be viewed as rules governing the conduct of military personnel in time of combat, and the President has undoubted authority to promulgate such rules and to provide for their enforcement.[133] The Army's Manual on the Law of Land Warfare, which represents the Army's interpretation of the customary international law governing armed conflict, can be expanded, altered, or overridden at any time by presidential act, as the Manual itself recognizes.[134] This makes clear that the source of authority for the application of the customary

[133] The President has broad authority under the Commander in Chief Clause to take action to superintend the military that overlaps with Congress's power to create the armed forces and to make rules for their regulation. See Loving v. United States, 517 U.S. 748, 772 (1996) ("The President's duties as Commander in Chief . . . require him to take responsible and continuing action to superintend the military, including courts-martial."); United States v. Eliason, 41 U.S. (16 Pet.) 291, 301 (1842) ("The power of the executive to establish rules and regulations for the government of the army, is undoubted."). The executive branch has long asserted that the President has "the unquestioned power to establish rules for the government of the army" in the absence of legislation, Power of the President to Create a Militia Bureau in the War Department, 10 Op. Att'y Gen. 11, 14 (1861). Indeed, at an early date, Attorney General Wirt concluded that regulations issued by the President on his independent authority remained in force even after Congress repealed the statute giving them legislative sanction "in all cases where they do not conflict with positive legislation." Brevet Pay of General Macomb, 1 Op. Att'y Gen. 547, 549 (1822). These independent powers of the President as commander in chief have frequently been exercised in administering justice in cases involving members of the Armed Forces: "[i]ndeed, until 1830, courts-martial were convened solely on [the President's] authority as Commander-in-Chief." Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation 479 (1987).

[134] FM 27-10, ch. 1, ¶ 7(c).

laws of war to the armed forces arises directly from the President's Commander in Chief power.

Moreover, the President has authority to limit or qualify the application of such rules. He could exempt, for example, certain operations from their coverage, or apply some but not all of the common laws of war to this conflict. This, too, is an aspect of the President's Commander in Chief authority. In narrowing the scope of the substantive prohibitions that apply in a particular conflict, the President may effectively determine the jurisdiction of military courts and commissions. He could thus preclude the trials of United States military personnel on specific charges of violations of the common laws of war.

Finally, a presidential determination concerning the application of the substantive prohibitions of the laws of war to the Afghanistan conflict would not preclude the normal system of military justice from applying to members of the U.S. Armed Services. Members of the Armed Services would still be subject to trial by courts martial for any violations of the Uniform Code of Military Justice (the "UCMJ"). Indeed, if the President were to issue an order, listing certain common laws of war for the military to follow, failure to obey that order would constitute an offense under the UCMJ.[135] Thus, although the President is not constitutionally bound by the customary laws of war, he can still choose to require the U.S. Armed Forces to obey them through the UCMJ.

Thus, our view that the customary international laws of armed conflict do not bind the President does not, in any way, compel the conclusion that members of the U.S. Armed Forces who commit acts that might be considered war crimes would be free from military justice.

*Conclusion*

For the foregoing reasons, we conclude that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions in Guantanamo Bay, Cuba, or to trial by military commission of al Qaeda or Taliban prisoners. We also conclude that customary international law has no binding legal effect on either the President or the military because it is not federal law, as recognized by the Constitution. Nonetheless, we also believe that the President, as Commander in Chief, has the constitutional authority to impose the customary laws of war on both the al Qaeda and Taliban groups and the U.S. Armed Forces.

Please let us know if we can provide further assistance.

[135] 10 U.S.C. § 892 (2000).

January 15, 2003

Department of Defense Memorandum

From: Secretary of Defense Rumsfeld
To: Head of U.S. Southern Command

Re: Interrogation techniques used on detainees at Guantanamo Bay.

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

3 x 5.6

MEMORANDUM FOR COMMANDER USSOUTHCOM JAN 15 2003

SUBJECT: Counter-Resistance Techniques (U)

(S) My December 2, 2002, approval of the use of all Category II techniques and one Category III technique during interrogations at Guantanamo is hereby rescinded. Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me. Such a request should include a thorough justification for the employment of those techniques and a detailed plan for the use of such techniques.

(U) In all interrogations, you should continue the humane treatment of detainees, regardless of the type of interrogation technique employed.

(U) Attached is a memo to the General Counsel setting in motion a study to be completed within 15 days. After my review, I will provide further guidance.

Classified by: Secretary Rumsfeld
Reason: 1.5(c)
Declassify on: 10 years



Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004



15 Jan 03

January 15, 2003

Department of Defense Memorandum

From: Secretary of Defense Rumsfeld
To: General Counsel of the Defense Department, William J. Haynes

RE: Review of interrogation methods

UNCLASSIFIED
~~SECRET~~

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JAN 15 2003

MEMORANDUM FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Detainee Interrogations (U)

(U) Establish a working group within the Department of Defense to assess the legal, policy, and operational issues relating to the interrogations of detainees held by the U.S. Armed Forces in the war on terrorism.

(U) The working group should consist of experts from your Office, the Office of the Under Secretary of Defense for Policy, the Military Departments, and the Joint Staff. The working group should address and make recommendations as warranted on the following issues:

- (S) Legal considerations raised by interrogation of detainees held by U.S. Armed Forces.
- (S) Policy considerations with respect to the choice of interrogation techniques, including:
  - (S) contribution to intelligence collection
  - (S) effect on treatment of captured US military personnel
  - (S) effect on detainee prosecutions
  - (S) historical role of US armed forces in conducting interrogations
- (S) Recommendations for employment of particular interrogation techniques by DoD interrogators.

(U) You should report your assessment and recommendations to me within 15 days.

Classified by: Secretary Rumsfeld
Reason: 1.5(c)
Declassify on: 10 years

UNCLASSIFIED

Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
By William P. Marriott, CAPT, USN
June 21, 2004

XD0175 103

January 17, 2003

Department of Defense Memorandum

From: Defense Department Counsel William J. Haynes
To: General Counsel for the Air Force

Re: Review of interrogation policies

[redacted] Unclassified When Attachment is Removed

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

JAN 1 7 2003

MEMORANDUM FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF THE AIR FORCE

SUBJECT: Working Group to Assess Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (U)

(U) You are hereby designated as the Chair of an intradepartmental working group and my executive agent to prepare an assessment and recommendations for me that are responsive to the attached memorandum of the Secretary of Defense, "Detainee Interrogations," dated January 15, 2003. In carrying out these responsibilities, you should call upon the resources of the offices of those indicated as recipients of copies of this memorandum, including requesting their participation, or that of members of their staffs, in this working group.

(U) Please provide me with periodic updates as available. I expect your effort to address and provide recommendations, as warranted, pertaining to the issues set out in the Secretary's memorandum. Your analysis should take into account the various potential geographic locations where U.S. Armed Forces may hold detainees.

(U) You should provide your assessment and recommendations to me by January 29, 2003. I appreciate your willingness to assume this important responsibility.

William J. Haynes II

Attachment:
As stated.

cc:
Under Secretary of Defense (Policy)
Acting Assistant Secretary of Defense (SO/LIC)
General Counsel of the Department of the Army
General Counsel of the Department of the Navy
Director of the Joint Staff
Director, Defense Intelligence Agency
Counsel for the Commandant of the Marine Corps
The Judge Advocate General of the Army
The Judge Advocate General of the Navy
The Judge Advocate General of the Air Force
Staff Judge Advocate for the Commandant of the Marine Corps

February 5, 2003

Slides

Slides from Secretary of State Colin L. Powell's presentation to the the United Nations Security Council on February 5, 2003.

# IRAQ

## FAILING TO DISARM

FEBRUARY 5, 2003

# IRAQ

## FAILING TO DISARM

## DENIAL & DECEPTION

COL: Peace. We just have a small question.

GEN: Yeah.

COL: About this committee that is coming...

GEN: Yeah, yeah.

COL: ...with Mohamed El Baradei [Director, International Atomic Energy Agency]

GEN: Yeah, yeah.

COL: Yeah.

GEN: Yeah?

COL: We have this modified vehicle.

GEN: Yeah.

COL: What do we say if one of them sees it?

GEN: You didn't get a modified...
You don't have a modified...

COL: By God, I have one.

GEN: Which? From the workshop...?

COL: From the al-Kindi Company

GEN: What?

COL: From al-Kindi.

GEN: Yeah, yeah. I'll come to you in the morning. I have some comments. I'm worried you all have something left.

COL: We evacuated everything. We don't have anything left.

GEN: I will come to you tomorrow.

COL: Okay.

HQ: Sir...

Field: Yes.

HQ: There is a directive of the [Republican] Guard Chief of Staff at the conference today...

Field: Yes.

HQ: They are inspecting the ammunition you have

Field: Yes.

HQ: ...for the possibility there are forbidden ammo.

Field: Yes?

HQ: For the possibility there is by chance, forbidden ammo.

Field: Yes.

HQ: And we sent you a message to inspect the scrap areas and the abandoned areas.

Field: Yes.

HQ: After you have carried out what is contained in the message. . . destroy the message.

Field: Yes.

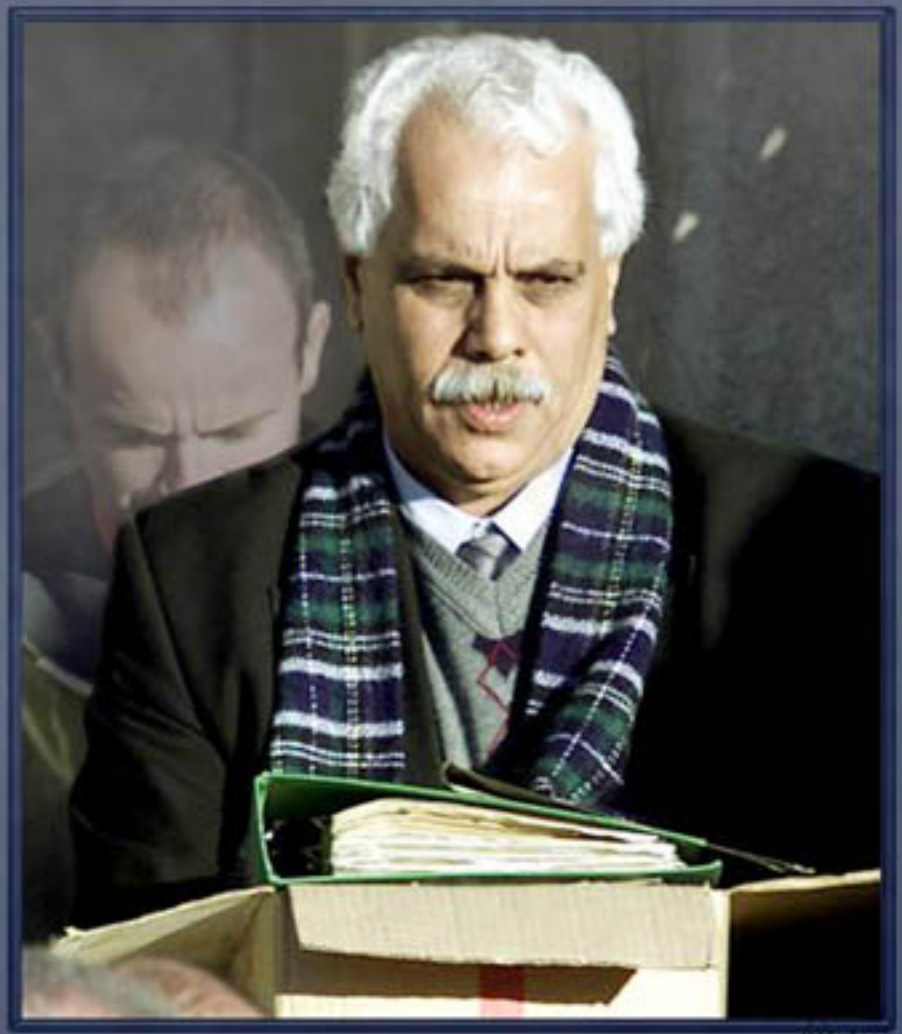
HQ: Because I don't want anyone to see this message.

Field: Okay okay.

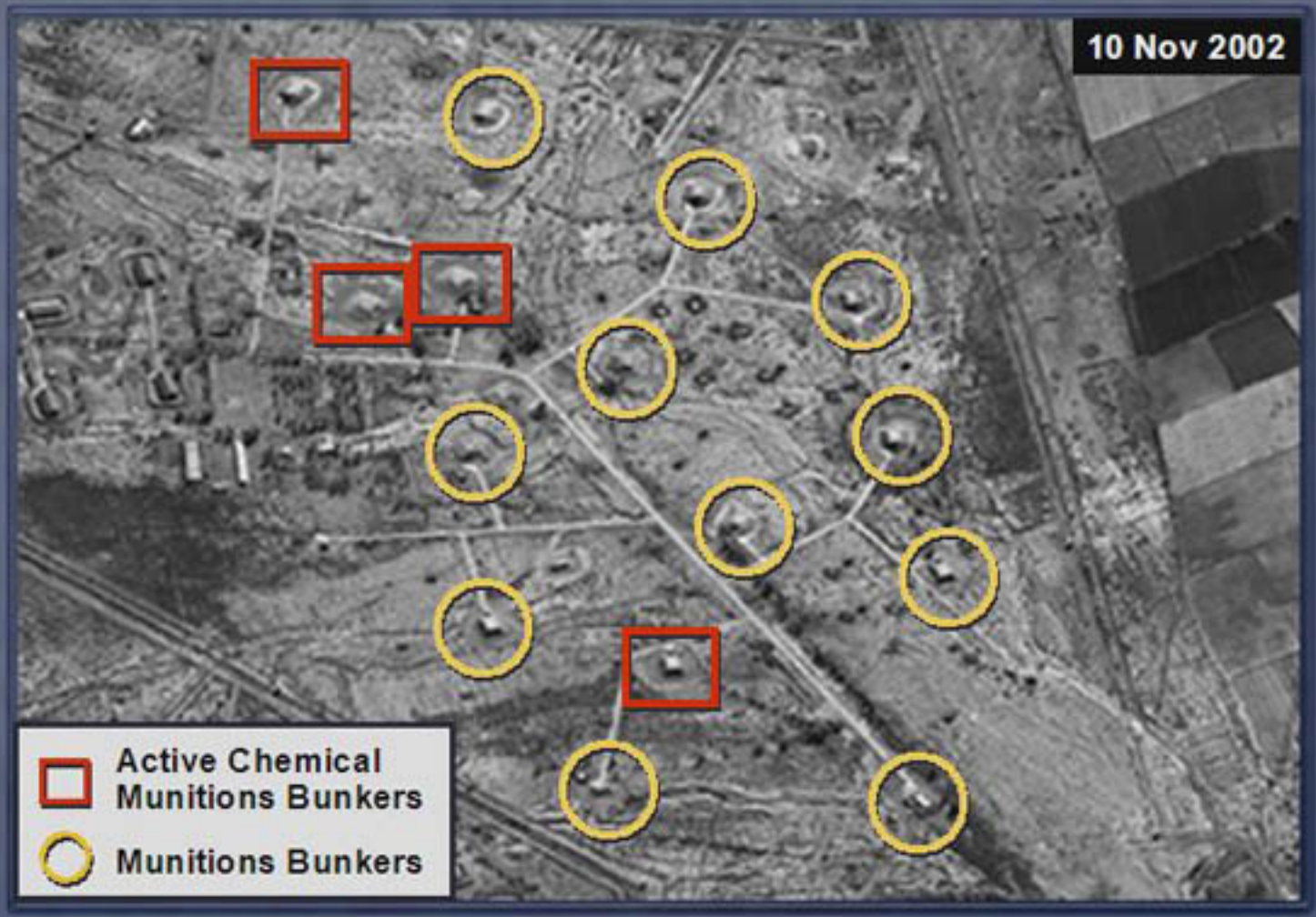
# Iraqi Declaration Documents



# Documents Found in Home of Iraqi Scientist



# Chemical Munitions Stored at Taji

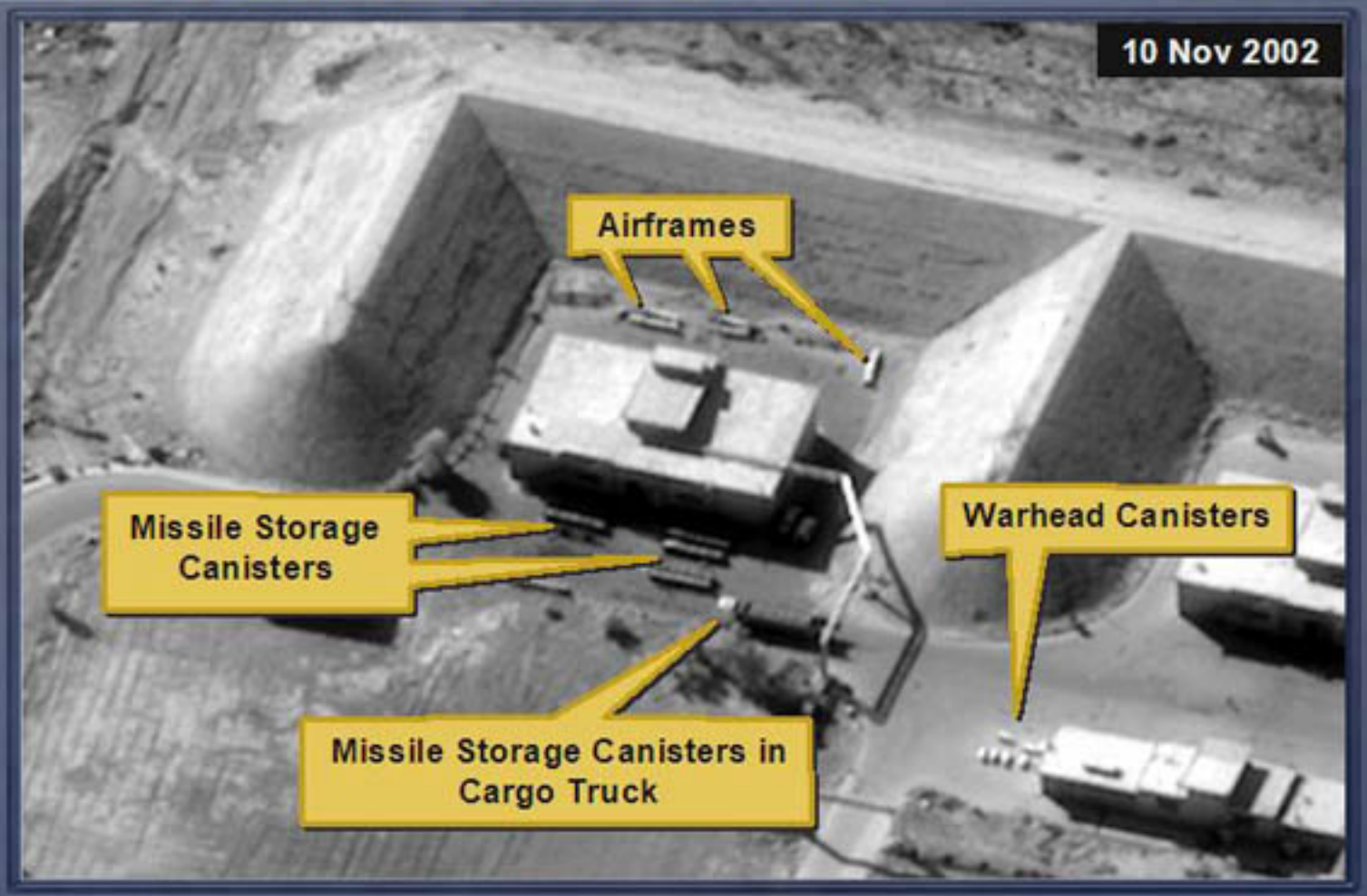


# Sanitization of Ammunition Depot at Taji

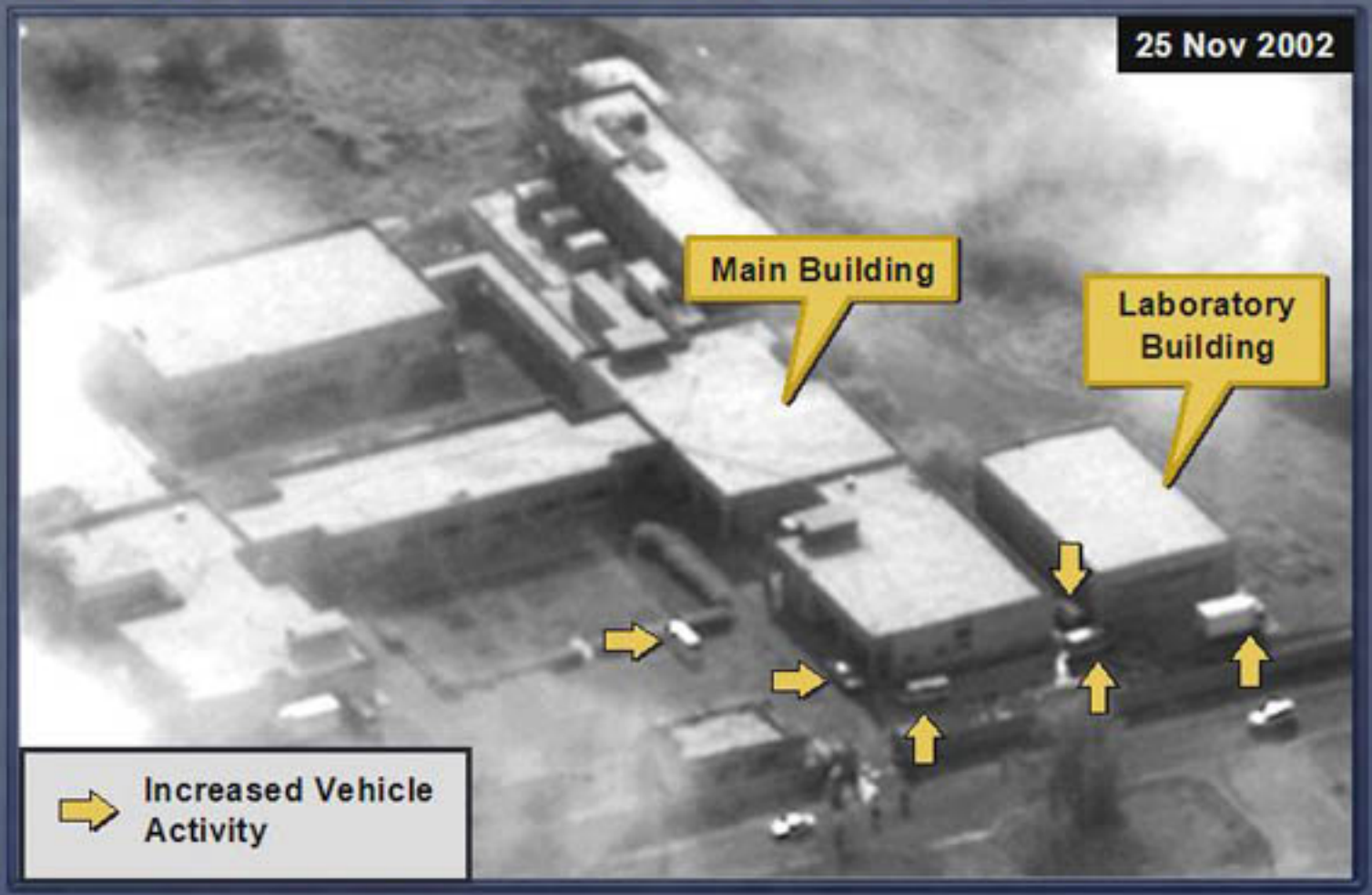




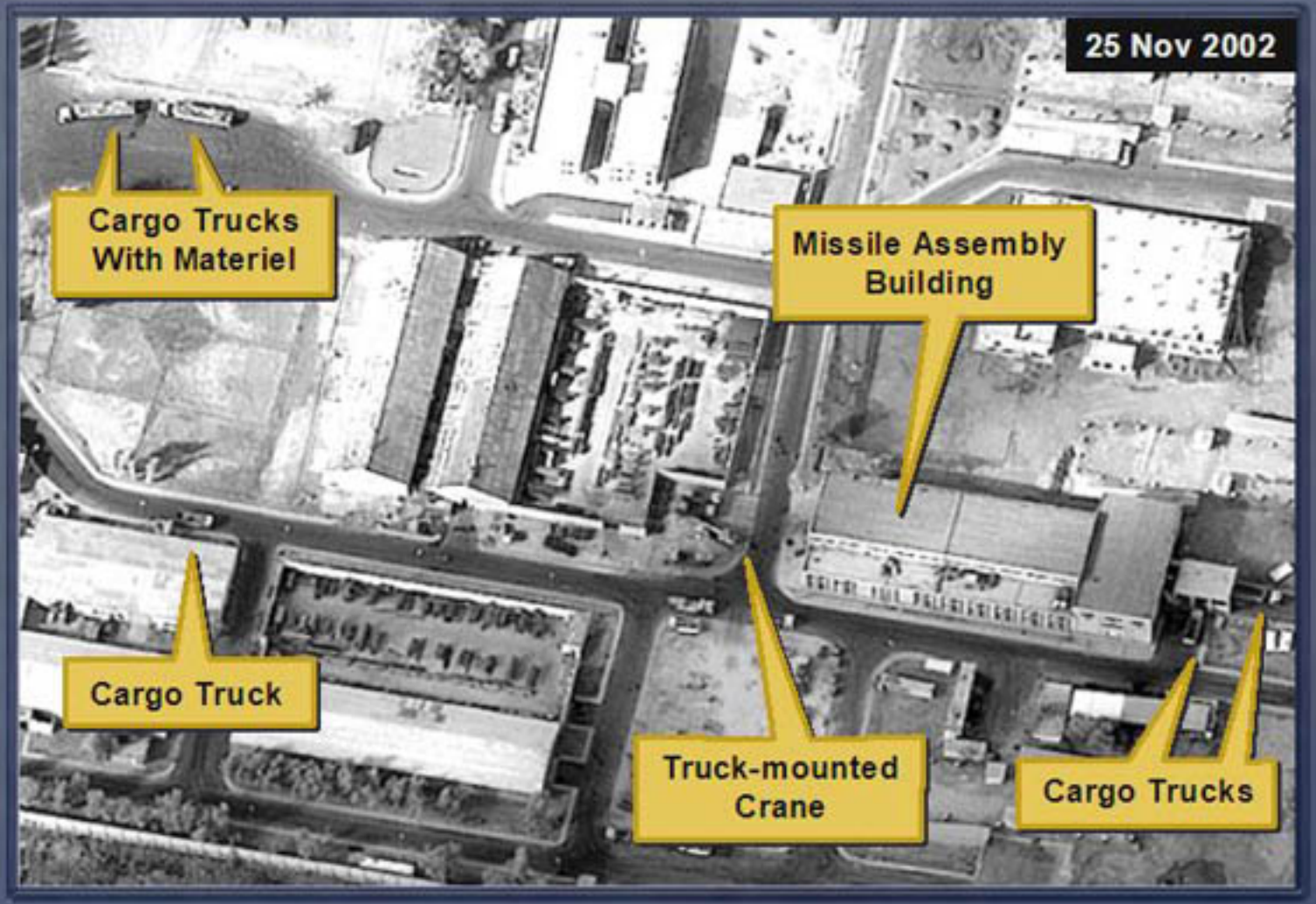

# Pre-Inspection Al Fatah Missile Removal
# Al-Musayyib Rocket Test Facility



# Pre-Inspection Material Removal
# Amiriyah Serum and Vaccine Institute



# Pre-Inspection Materiel Removal, Ibn al Haytham



# Iraq Denies UN Reconnaissance



# Security Council Resolution 1441

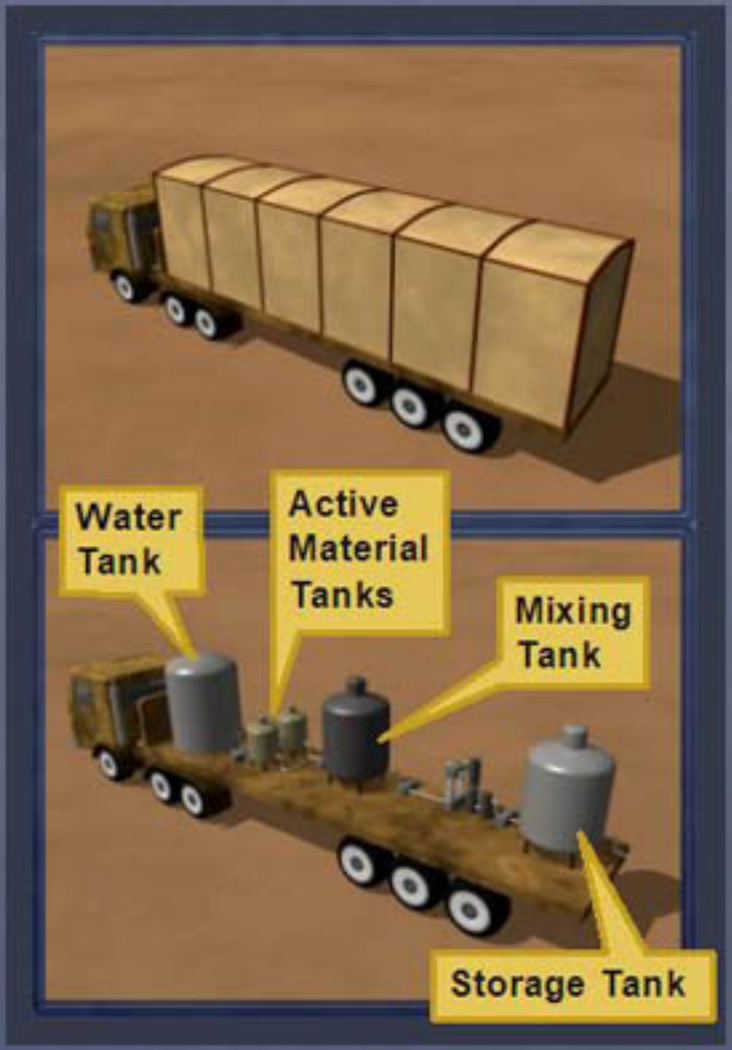
**4.** Decides that false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure by Iraq at any time to comply with, and cooperate fully in the implementation of, this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below;

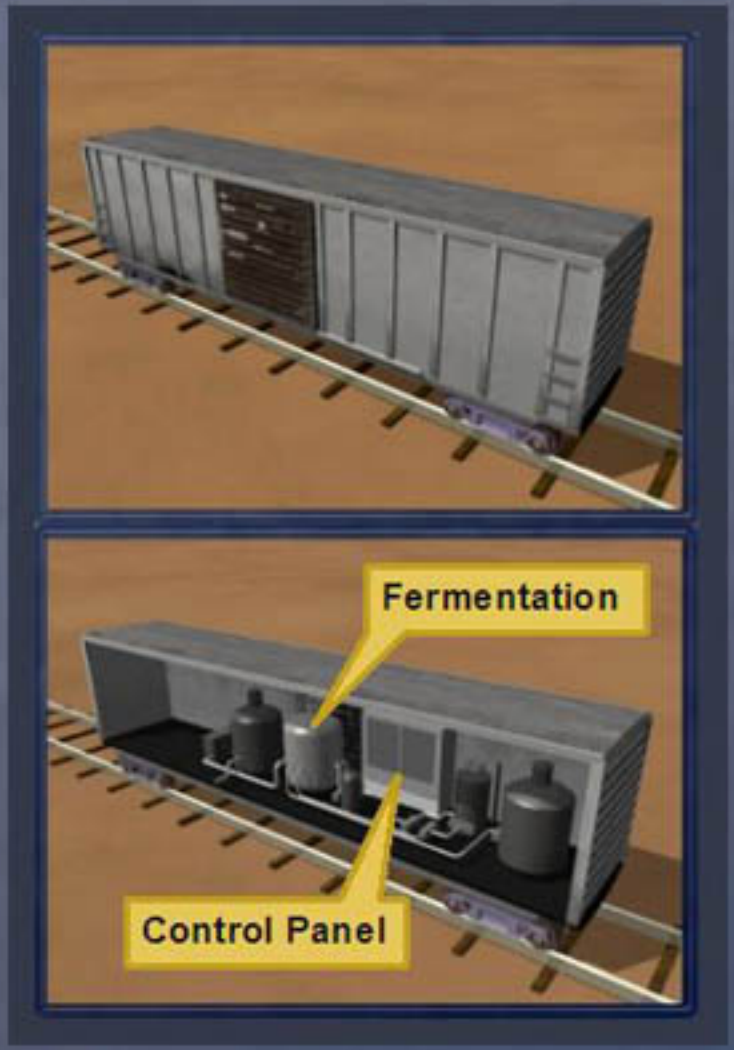
# IRAQ

## FAILING TO DISARM

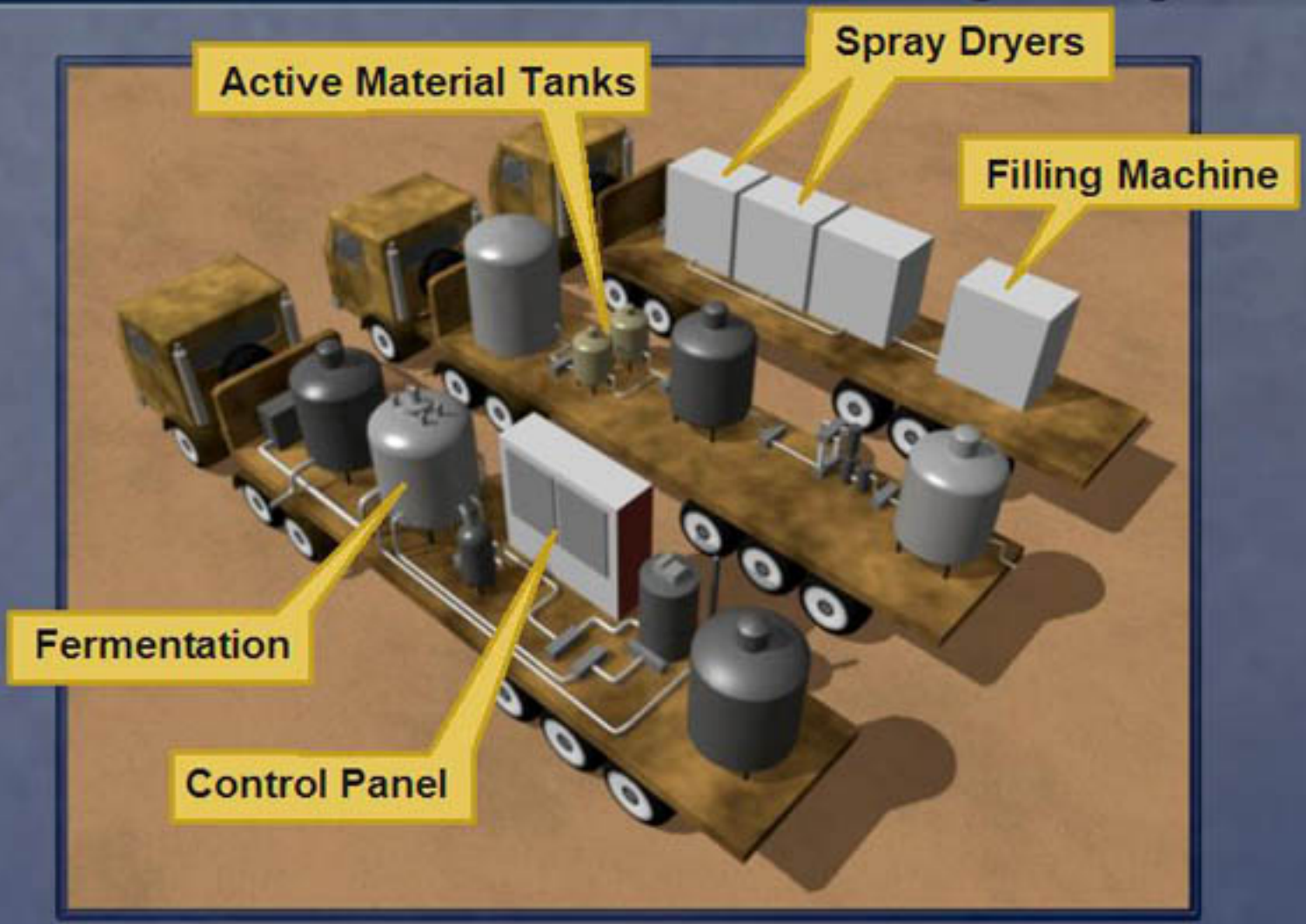
### BIOLOGICAL WEAPONS

# Mobile Production Facilities For Biological Agents

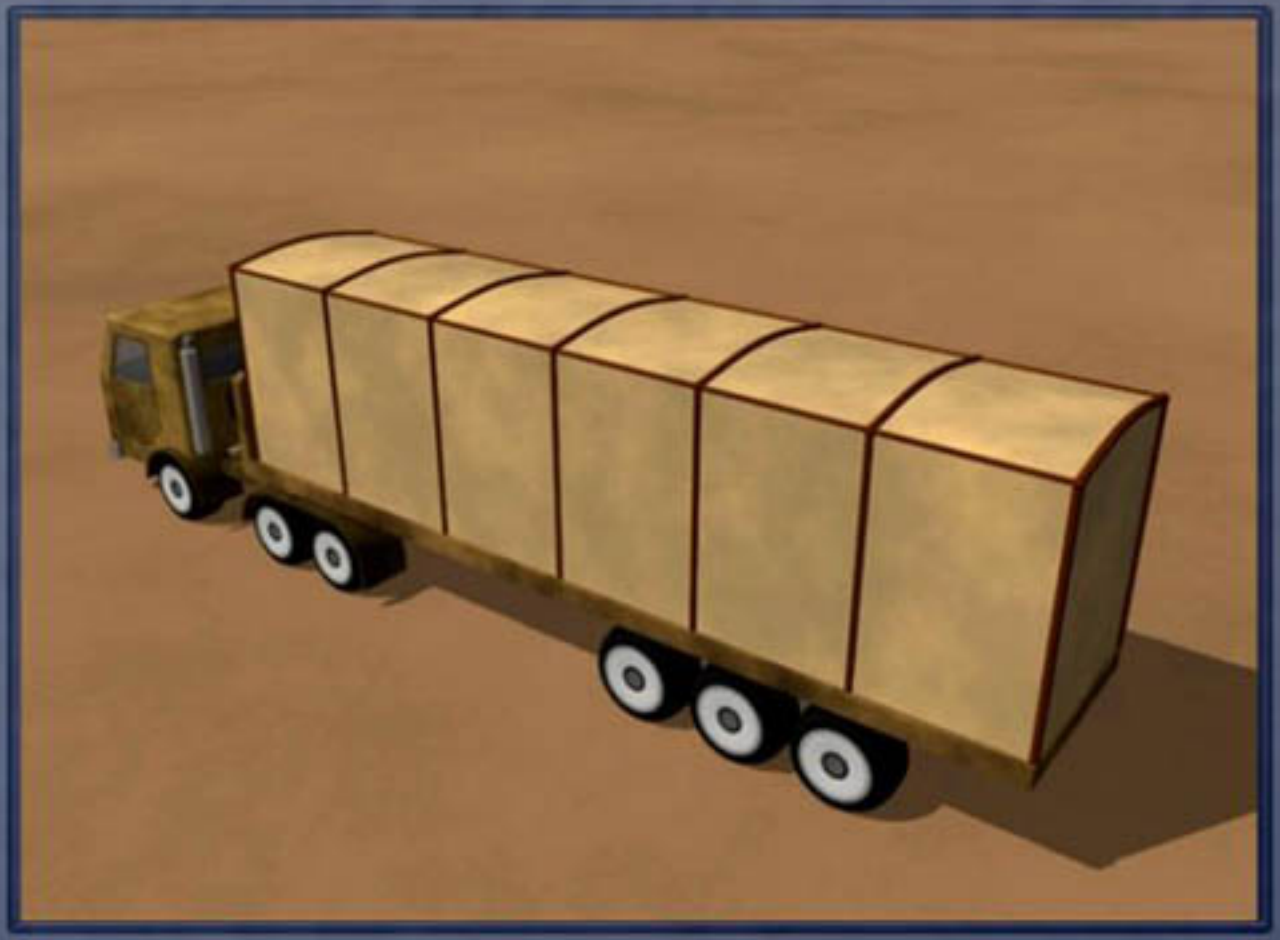


# Mobile Production Facilities For Biological Agents



# Mobile Production Facilities For Biological Agents



# Iraqi Test Flight Spraying Simulated Anthrax



# IRAQ

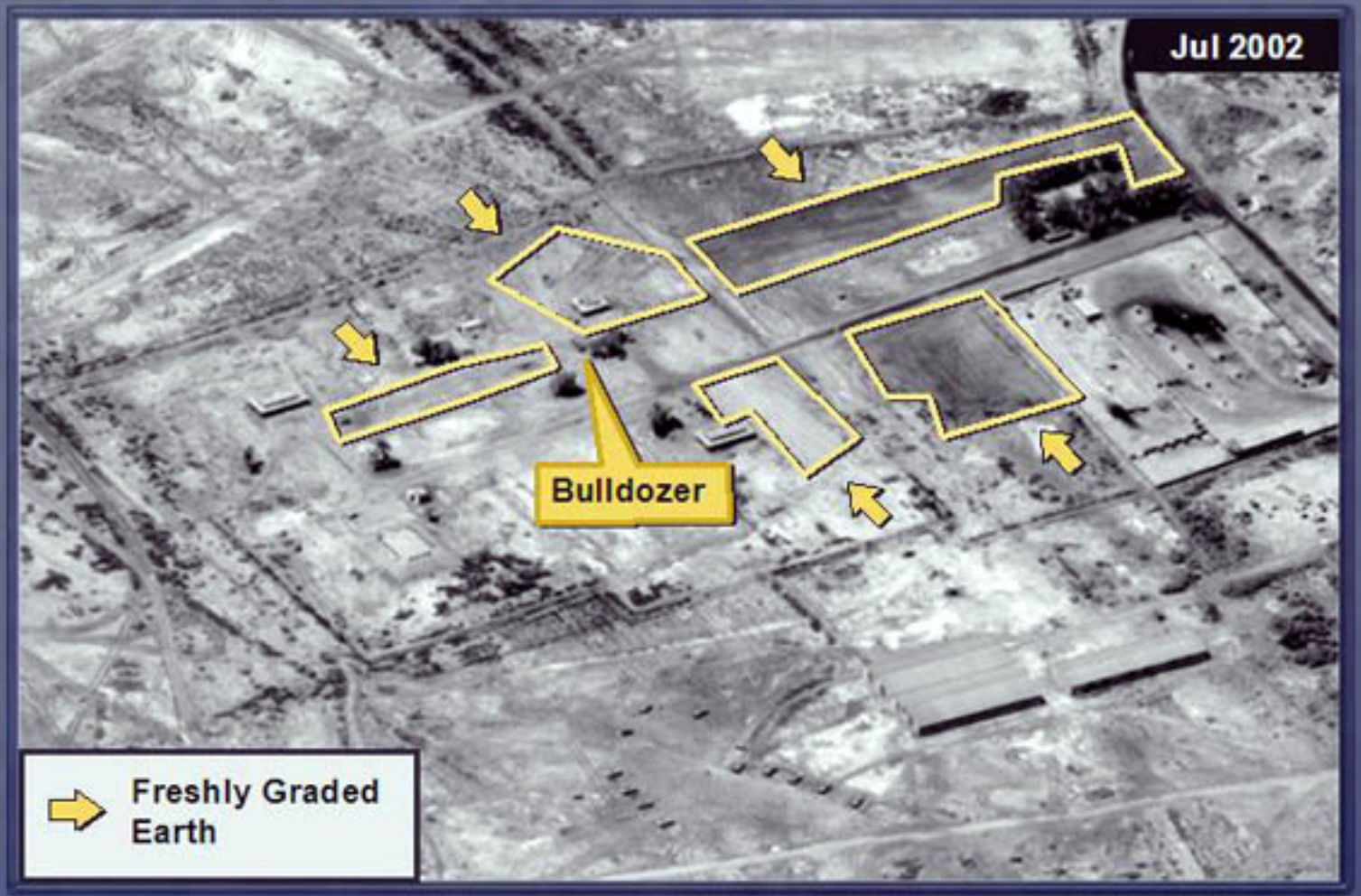
## FAILING TO DISARM

### CHEMICAL WEAPONS

# Chemical Weapons Leaving Al-Musayyib



# Bulldozed and Freshly Graded Earth, Al-Musayyib Chemical Complex



COL: Captain Ibrahim?

CAPT: I am with you, Sir.

COL: Remove.

CAPT: Remove. [Repeats instructions]

COL: The expression.

CAPT: The expression.

COL: "Nerve agents."

CAPT: "Nerve agents."

COL: Wherever it comes up.

CAPT: Wherever it comes up.

COL: In the wireless instructions.

CAPT: In the instructions.

COL: Wireless.

CAPT: Wireless.

# UN Found 122mm Chemical Warhead

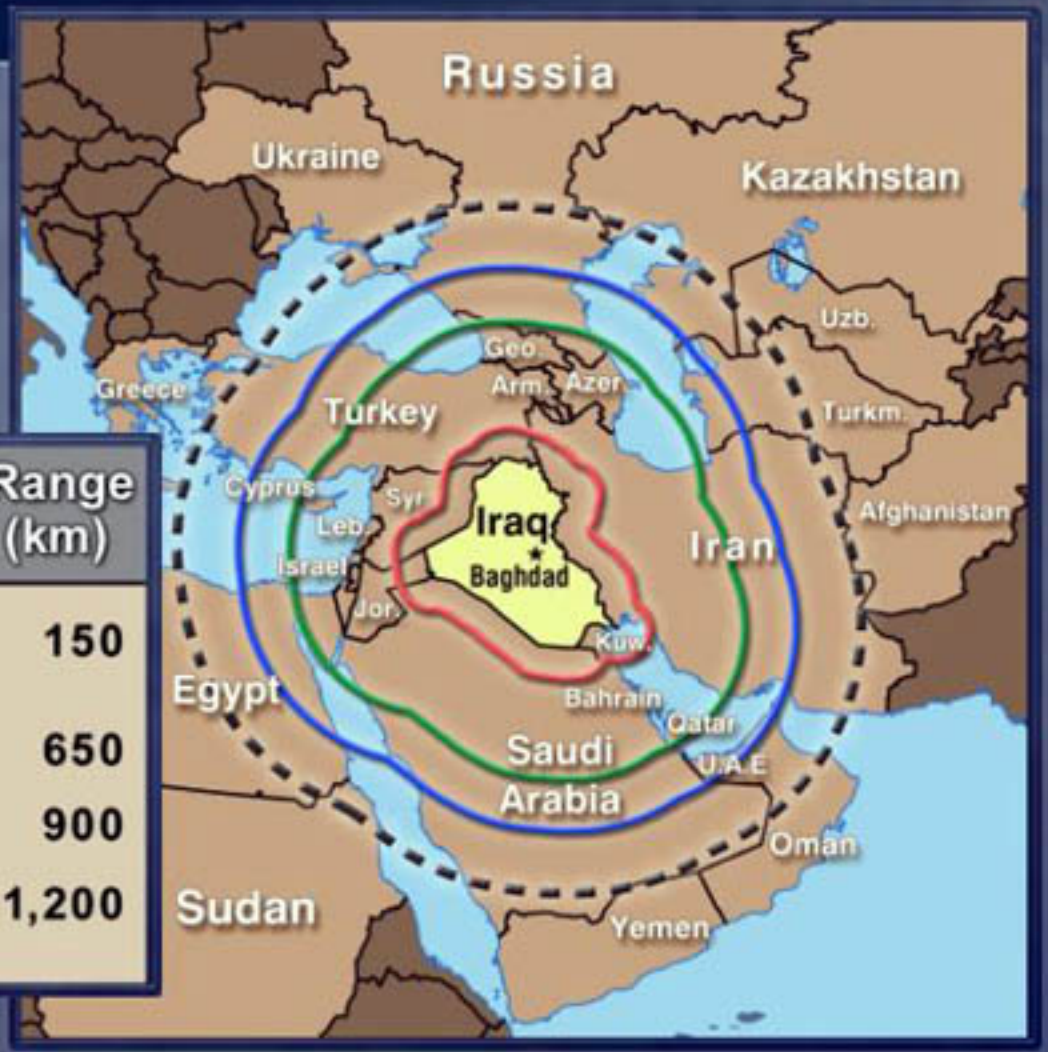


# IRAQ

## FAILING TO DISARM

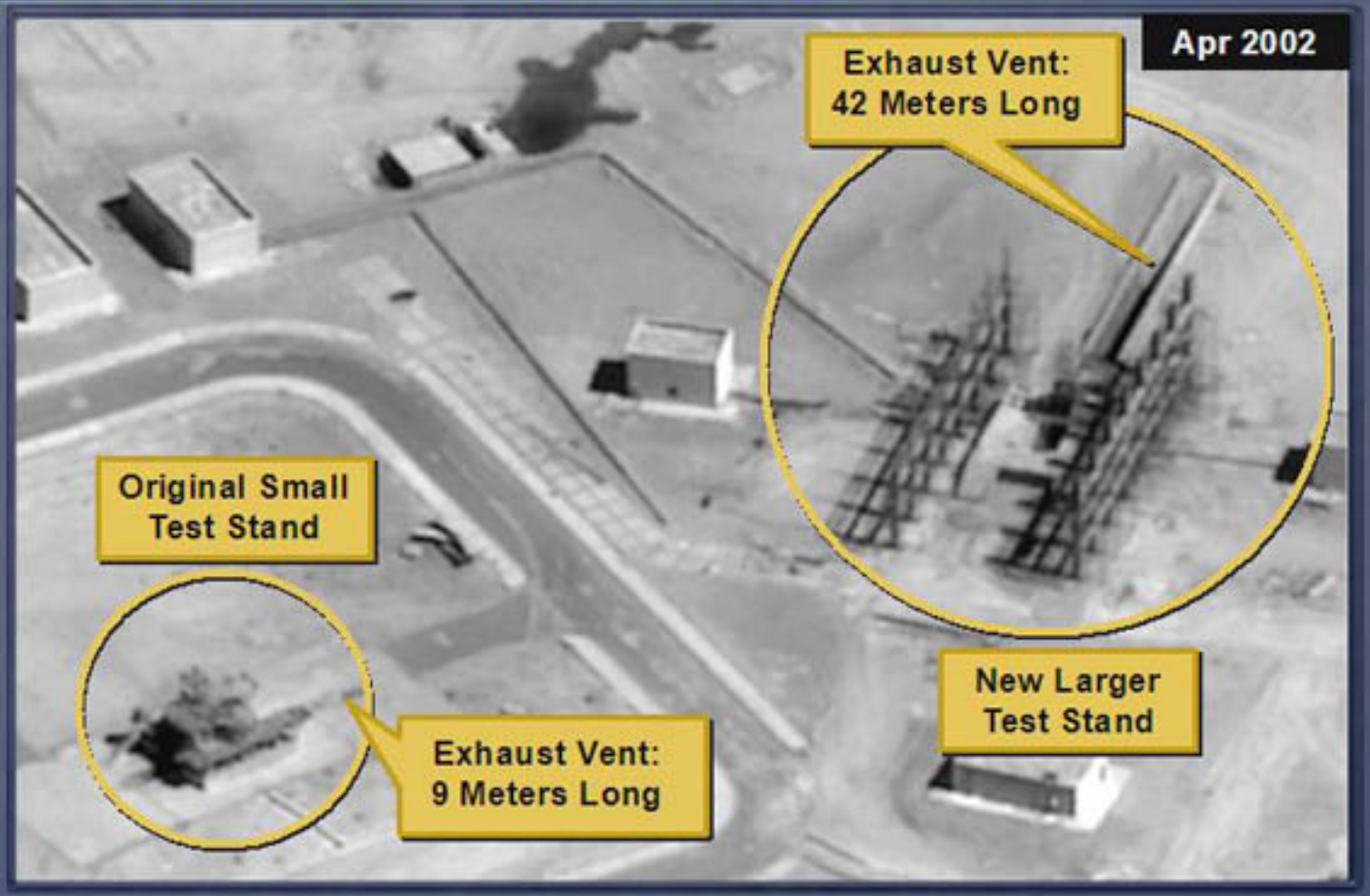
### DELIVERY SYSTEMS

# Iraq's Covert Scud Variants and Developmental Missile




| Ballistic Missile Delivery System | Range (km) |
|---|---|
| Permitted UN range | 150 |
| Al Husayn | 650 |
| Al Abbas | 900 |
| Missile using new engine | 1,200 |

# Test Stand Comparison
# Al-Rafa'h Liquid Engine Test Facility



# UNSCOM Photo



# Iraqi UAV Exceeding UN Limits



# IRAQ

## FAILING TO DISARM

### TERRORISM

# Terrorist Poison and Explosives Factory, Khurmal



# Al-Zarqawi's Iraq-Linked Terrorist Network



Al-Zarqawi



Abu Taisir



Abu 'Atiya

Pankisi Gorge



Abu Hafs

Russia



Abu Ashraf



Detained Al-Qai'da Operative

Possible Italy Cell

UK Poison Cell



Merouane Benahmed



Menad Benchellali

France Poison Cell

Spain Cell

# Al-Zarqawi's Iraq-Linked Terrorist Network



-Zarqawi



Abu 'Atiya Pankisi Gorge



Abu T



Abu Ashraf



Abu Hafs

Russia



Detained Al-Qai'da Operative

UK Poison Cell

Possible Italy Cell



Merouane Benahmed



Menad Benchellali

France Poison Cell

Spain Cell

# Al-Zarqawi's Iraq-Linked Terrorist Network



Al-Zarqawi



Abu Taisir



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Russia



Abu Ashraf



Detained Al-Qai'da Operative

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Merouane Benahmed



Menad Benchellali

France Poison Cell

Spain Cell

# Al-Zarqawi's Iraq-Linked Terrorist Network



Al-Zarqa



Abu Taisir



Abu 'Atiya

Pankisi Gorge



Abu Hafs

Russia



Ashraf



Detained Al-Qai'da Operative

Possible Italy Cell

UK Poison Cell



Merouane Benahmed



Menad Benchellali

France Poison Cell

Spain Cell

# IRAQ

## FAILING TO DISARM

### NUCLEAR WEAPONS

# Aluminum Tube for Uranium Enrichment



# Intercepted Aluminum Tubes



# IRAQ

## FAILING TO DISARM

### HUMAN RIGHTS VIOLATIONS

# IRAQ

## FAILING TO DISARM

FEBRUARY 5, 2003

**February 10, 2003**

# Department of Defense Guidelines for media embedded with U.S. troops during future operations in Iraq

101900Z FEB 03
FM SECDEF WASHINGTON DC//OASD-PA//
TO SECDEF WASHINGTON DC//CHAIRS//
AIG 8777
HQ USEUCOM VAIHINGEN GE//PA//
USCINCEUR VAIHINGEN GE//ECPA//
JOINT STAFF WASHINGTON DC//PA//
SECSTATE WASHINGTON DC//PA//
CJCS WASHINGTON DC//PA//
NSC WASHINGTON DC
WHITE HOUSE SITUATION ROOM
INFO SECDEF WASHINGTON DC//OASD-PA/DPO//

UNCLAS

SUBJECT: PUBLIC AFFAIRS GUIDANCE (PAG) ON EMBEDDING MEDIA DURING POSSIBLE FUTURE OPERATIONS/DEPLOYMENTS IN THE U.S. CENTRAL COMMANDS (CENTCOM) AREA OF RESPONSIBILITY (AOR).

REFERENCES: REF. A. SECDEF MSG, DTG 172200Z JAN 03, SUBJ: PUBLIC AFFAIRS GUIDANCE (PAG) FOR MOVEMENT OF FORCES INTO THE CENTCOM AOR FOR POSSIBLE FUTURE OPERATIONS.

1. PURPOSE. THIS MESSAGE PROVIDES GUIDANCE, POLICIES AND PROCEDURES ON EMBEDDING NEWS MEDIA DURING POSSIBLE FUTURE OPERATIONS/DEPLOYMENTS IN THE CENTCOM AOR. IT CAN BE ADAPTED FOR USE IN OTHER UNIFIED COMMAND AORS AS NECESSARY.

2. POLICY.

2.A. THE DEPARTMENT OF DEFENSE (DOD) POLICY ON MEDIA COVERAGE OF FUTURE MILITARY OPERATIONS IS THAT MEDIA WILL HAVE LONG-TERM, MINIMALLY RESTRICTIVE ACCESS TO U.S. AIR, GROUND AND NAVAL FORCES THROUGH EMBEDDING. MEDIA COVERAGE OF ANY FUTURE OPERATION WILL, TO A LARGE EXTENT, SHAPE PUBLIC PERCEPTION OF THE NATIONAL SECURITY ENVIRONMENT NOW AND IN THE YEARS AHEAD. THIS HOLDS TRUE FOR THE U.S. PUBLIC; THE PUBLIC IN ALLIED COUNTRIES WHOSE OPINION CAN AFFECT THE DURABILITY OF OUR COALITION; AND PUBLICS IN COUNTRIES WHERE WE CONDUCT OPERATIONS, WHOSE PERCEPTIONS OF US CAN AFFECT THE COST AND DURATION OF OUR INVOLVEMENT. OUR ULTIMATE STRATEGIC SUCCESS IN BRINGING PEACE AND SECURITY TO THIS REGION WILL COME IN OUR LONG-TERM COMMITMENT TO SUPPORTING OUR DEMOCRATIC IDEALS. WE NEED TO TELL THE FACTUAL STORY - GOOD OR BAD - BEFORE OTHERS SEED THE MEDIA WITH DISINFORMATION AND DISTORTIONS, AS THEY MOST CERTAINLY WILL CONTINUE TO DO. OUR PEOPLE IN THE FIELD NEED TO TELL OUR STORY – ONLY COMMANDERS CAN ENSURE THE MEDIA GET TO THE STORY

ALONGSIDE THE TROOPS. WE MUST ORGANIZE FOR AND FACILITATE ACCESS OF NATIONAL AND INTERNATIONAL MEDIA TO OUR FORCES, INCLUDING THOSE FORCES ENGAGED IN GROUND OPERATIONS, WITH THE GOAL OF DOING SO RIGHT FROM THE START. TO ACCOMPLISH THIS, WE WILL EMBED MEDIA WITH OUR UNITS. THESE EMBEDDED MEDIA WILL LIVE, WORK AND TRAVEL AS PART OF THE UNITS WITH WHICH THEY ARE EMBEDDED TO FACILITATE MAXIMUM, IN-DEPTH COVERAGE OF U.S. FORCES IN COMBAT AND RELATED OPERATIONS. COMMANDERS AND PUBLIC AFFAIRS OFFICERS MUST WORK TOGETHER TO BALANCE THE NEED FOR MEDIA ACCESS WITH THE NEED FOR OPERATIONAL SECURITY.

2.B. MEDIA WILL BE EMBEDDED WITH UNIT PERSONNEL AT AIR AND GROUND FORCES BASES AND AFLOAT TO ENSURE A FULL UNDERSTANDING OF ALL OPERATIONS. MEDIA WILL BE GIVEN ACCESS TO OPERATIONAL COMBAT MISSIONS, INCLUDING MISSION PREPARATION AND DEBRIEFING, WHENEVER POSSIBLE.

2.C. A MEDIA EMBED IS DEFINED AS A MEDIA REPRESENTATIVE REMAINING WITH A UNIT ON AN EXTENDED BASIS - PERHAPS A PERIOD OF WEEKS OR EVEN MONTHS. COMMANDERS WILL PROVIDE BILLETING, RATIONS AND MEDICAL ATTENTION, IF NEEDED, TO THE EMBEDDED MEDIA COMMENSURATE WITH THAT PROVIDED TO MEMBERS OF THE UNIT, AS WELL AS ACCESS TO MILITARY TRANSPORTATION AND ASSISTANCE WITH COMMUNICATIONS FILING/TRANSMITTING MEDIA PRODUCTS, IF REQUIRED.

2.C.1. EMBEDDED MEDIA ARE NOT AUTHORIZED USE OF THEIR OWN VEHICLES WHILE TRAVELING IN AN EMBEDDED STATUS.

2.C.2. TO THE EXTENT POSSIBLE, SPACE ON MILITARY TRANSPORTATION WILL BE MADE AVAILABLE FOR MEDIA EQUIPMENT NECESSARY TO COVER A PARTICULAR OPERATION. THE MEDIA IS RESPONSIBLE FOR LOADING AND CARRYING THEIR OWN EQUIPMENT AT ALL TIMES. USE OF PRIORITY INTER-THEATER AIRLIFT FOR EMBEDDED MEDIA TO COVER STORIES, AS WELL AS TO FILE STORIES, IS HIGHLY ENCOURAGED. SEATS ABOARD VEHICLES, AIRCRAFT AND NAVAL SHIPS WILL BE MADE AVAILABLE TO ALLOW MAXIMUM COVERAGE OF U.S. TROOPS IN THE FIELD.

2.C.3. UNITS SHOULD PLAN LIFT AND LOGISTICAL SUPPORT TO ASSIST IN MOVING MEDIA PRODUCTS TO AND FROM THE BATTLEFIELD SO AS TO TELL OUR STORY IN A TIMELY MANNER. IN THE EVENT OF COMMERCIAL COMMUNICATIONS DIFFICULTIES, MEDIA ARE AUTHORIZED TO FILE STORIES VIA EXPEDITIOUS MILITARY SIGNAL/COMMUNICATIONS CAPABILITIES.

2.C.4. NO COMMUNICATIONS EQUIPMENT FOR USE BY MEDIA IN THE CONDUCT OF THEIR DUTIES WILL BE SPECIFICALLY PROHIBITED. HOWEVER, UNIT COMMANDERS MAY IMPOSE TEMPORARY RESTRICTIONS ON

ELECTRONIC TRANSMISSIONS FOR OPERATIONAL SECURITY REASONS. MEDIA WILL SEEK APPROVAL TO USE ELECTRONIC DEVICES IN A COMBAT/HOSTILE ENVIRONMENT, UNLESS OTHERWISE DIRECTED BY THE UNIT COMMANDER OR HIS/HER DESIGNATED REPRESENTATIVE. THE USE OF COMMUNICATIONS EQUIPMENT WILL BE DISCUSSED IN FULL WHEN THE MEDIA ARRIVE AT THEIR ASSIGNED UNIT.

3. PROCEDURES.

3.A. THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS (OASD(PA) IS THE CENTRAL AGENCY FOR MANAGING AND VETTING MEDIA EMBEDS TO INCLUDE ALLOCATING EMBED SLOTS TO MEDIA ORGANIZATIONS. EMBED AUTHORITY MAY BE DELEGATED TO SUBORDINATE ELEMENTS AFTER THE COMMENCEMENT OF HOSTILITIES AND AT THE DISCRETION OF OASD(PA). EMBED OPPORTUNITIES WILL BE ASSIGNED TO MEDIA ORGANIZATIONS, NOT TO INDIVIDUAL REPORTERS. THE DECISION AS TO WHICH MEDIA REPRESENTATIVE WILL FILL ASSIGNED EMBED SLOTS WILL BE MADE BY THE DESIGNATED POC FOR EACH NEWS ORGANIZATION.

3.A.1. IAW REF. A, COMMANDERS OF UNITS IN RECEIPT OF A DEPLOYMENT ORDER MAY EMBED REGIONAL/LOCAL MEDIA DURING PREPARATIONS FOR DEPLOYMENT, DEPLOYMENT AND ARRIVAL IN THEATER UPON RECEIPT OF THEATER CLEARANCE FROM CENTCOM AND APPROVAL OF THE COMPONENT COMMAND. COMMANDERS WILL INFORM THESE MEDIA, PRIOR TO THE DEPLOYING EMBED, THAT OASD(PA) IS THE APPROVAL AUTHORITY FOR ALL COMBAT EMBEDS AND THAT THEIR PARTICULAR EMBED MAY END AFTER THE UNIT'S ARRIVAL IN THEATER. THE MEDIA ORGANIZATION MAY APPLY TO OASD(PA) FOR CONTINUED EMBEDDING, BUT THERE IS NO GUARANTEE AND THE MEDIA ORGANIZATION WILL HAVE TO MAKE ARRANGEMENTS FOR AND PAY FOR THE JOURNALISTS' RETURN TRIP.

3.B. WITHOUT MAKING COMMITMENTS TO MEDIA ORGANIZATIONS, DEPLOYING UNITS WILL IDENTIFY LOCAL MEDIA FOR POTENTIAL EMBEDS AND NOMINATE THEM THROUGH PA CHANNELS TO OASD(PA) (POC: MAJ TIM BLAIR, DSN 227-1253; COMM. 703-697-1253; EMAIL TIMOTHY.BLAIR@OSD.MIL). INFORMATION REQUIRED TO BE FORWARDED INCLUDES MEDIA ORGANIZATION, TYPE OF MEDIA AND CONTACT INFORMATION INCLUDING BUREAU CHIEF/MANAGING EDITOR/NEWS DIRECTOR'S NAME; OFFICE, HOME AND CELL PHONE NUMBERS; PAGER NUMBERS AND EMAIL ADDRESSES. SUBMISSIONS FOR EMBEDS WITH SPECIFIC UNITS SHOULD INCLUDE AN UNIT'S RECOMMENDATION AS TO WHETHER THE REQUEST SHOULD BE HONORED.

3.C. UNIT COMMANDERS SHOULD ALSO EXPRESS, THROUGH THEIR CHAIN OF COMMAND AND PA CHANNELS TO OASD(PA), THEIR DESIRE AND CAPABILITY TO SUPPORT ADDITIONAL MEDIA EMBEDS BEYOND THOSE ASSIGNED.

3.D. FREELANCE MEDIA WILL BE AUTHORIZED TO EMBED IF THEY ARE SELECTED BY A NEWS ORGANIZATION AS THEIR EMBED REPRESENTATIVE.

3.E. UNITS WILL BE AUTHORIZED DIRECT COORDINATION WITH MEDIA AFTER ASSIGNMENT AND APPROVAL BY OASD(PA).

3.E.1.UNITS ARE RESPONSIBLE FOR ENSURING THAT ALL EMBEDDED MEDIA AND THEIR NEWS ORGANIZATIONS HAVE SIGNED THE "RELEASE, INDEMNIFICATION, AND HOLD HARMLESS AGREEMENT AND AGREEMENT NOT TO SUE", FOUND AT HTTP://WWW.DEFENSELINK.MIL/NEWS/FEB2003/D20030210EMBED.PDF. UNITS MUST MAINTAIN A COPY OF THIS AGREEMENT FOR ALL MEDIA EMBEDDED WITH THEIR UNIT.

3.F. EMBEDDED MEDIA OPERATE AS PART OF THEIR ASSIGNED UNIT. AN ESCORT MAY BE ASSIGNED AT THE DISCRETION OF THE UNIT COMMANDER. THE ABSENCE OF A PA ESCORT IS NOT A REASON TO PRECLUDE MEDIA ACCESS TO OPERATIONS.

3.G. COMMANDERS WILL ENSURE THE MEDIA ARE PROVIDED WITH EVERY OPPORTUNITY TO OBSERVE ACTUAL COMBAT OPERATIONS. THE PERSONAL SAFETY OF CORRESPONDENTS IS NOT A REASON TO EXCLUDE THEM FROM COMBAT AREAS.

3.H. IF, IN THE OPINION OF THE UNIT COMMANDER, A MEDIA REPRESENTATIVE IS UNABLE TO WITHSTAND THE RIGOROUS CONDITIONS REQUIRED TO OPERATE WITH THE FORWARD DEPLOYED FORCES, THE COMMANDER OR HIS/HER REPRESENTATIVE MAY LIMIT THE REPRESENTATIVES PARTICIPATION WITH OPERATIONAL FORCES TO ENSURE UNIT SAFETY AND INFORM OASD(PA) THROUGH PA CHANNELS AS SOON AS POSSIBLE. GENDER WILL NOT BE AN EXCLUDING FACTOR UNDER ANY CIRCUMSTANCE.

3.I. IF FOR ANY REASON A MEDIA REPRESENTATIVE CANNOT PARTICIPATE IN AN OPERATION, THEY WILL BE TRANSPORTED TO THE NEXT HIGHER HEADQUARTERS FOR THE DURATION OF THE OPERATION.

3.J. COMMANDERS WILL OBTAIN THEATER CLEARANCE FROM CENTCOM/PA FOR MEDIA EMBARKING ON MILITARY CONVEYANCE FOR PURPOSES OF EMBEDDING.

3.K. UNITS HOSTING EMBEDDED MEDIA WILL ISSUE INVITATIONAL TRAVEL ORDERS, AND NUCLEAR, BIOLOGICAL AND CHEMICAL (NBC) GEAR. SEE PARA. 5. FOR DETAILS ON WHICH ITEMS ARE ISSUED AND WHICH ITEMS THE MEDIA ARE RESPONSIBLE TO PROVIDE FOR THEMSELVES.

3.L. MEDIA ARE RESPONSIBLE FOR OBTAINING THEIR OWN PASSPORTS AND VISAS.

3.M. MEDIA WILL AGREE TO ABIDE BY THE CENTCOM/OASD(PA) GROUND RULES STATED IN PARA. 4 OF THIS MESSAGE IN EXCHANGE FOR COMMAND/UNIT-PROVIDED SUPPORT AND ACCESS TO SERVICE MEMBERS, INFORMATION AND OTHER PREVIOUSLY-STATED PRIVILEGES. ANY VIOLATION OF THE GROUND RULES COULD RESULT IN TERMINATION OF THAT MEDIA'S EMBED OPPORTUNITY.

3.N. DISPUTES/DIFFICULTIES. ISSUES, QUESTIONS, DIFFICULTIES OR DISPUTES ASSOCIATED WITH GROUND RULES OR OTHER ASPECTS OF EMBEDDING MEDIA THAT CANNOT BE RESOLVED AT THE UNIT LEVEL, OR THROUGH THE CHAIN OF COMMAND, WILL BE FORWARDED THROUGH PA CHANNELS FOR RESOLUTION. COMMANDERS WHO WISH TO TERMINATE AN EMBED FOR CAUSE MUST NOTIFY CENTCOM/PA PRIOR TO TERMINATION. IF A DISPUTE CANNOT BE RESOLVED AT A LOWER LEVEL, OASD(PA) WILL BE THE FINAL RESOLUTION AUTHORITY. IN ALL CASES, THIS SHOULD BE DONE AS EXPEDITIOUSLY AS POSSIBLE TO PRESERVE THE NEWS VALUE OF THE SITUATION.

3.O. MEDIA WILL PAY THEIR OWN BILLETING EXPENSES IF BILLETED IN A COMMERCIAL FACILITY.

3.P. MEDIA WILL DEPLOY WITH THE NECESSARY EQUIPMENT TO COLLECT AND TRANSMIT THEIR STORIES.

3.Q. THE STANDARD FOR RELEASE OF INFORMATION SHOULD BE TO ASK "WHY NOT RELEASE" VICE "WHY RELEASE." DECISIONS SHOULD BE MADE ASAP, PREFERABLY IN MINUTES, NOT HOURS.

3.R. THERE IS NO GENERAL REVIEW PROCESS FOR MEDIA PRODUCTS. SEE PARA 6.A. FOR FURTHER DETAIL CONCERNING SECURITY AT THE SOURCE.

3.S. MEDIA WILL ONLY BE GRANTED ACCESS TO DETAINEES OR EPWS WITHIN THE PROVISIONS OF THE GENEVA CONVENTIONS OF 1949. SEE PARA. 4.G.17. FOR THE GROUND RULE.

3.T. HAVING EMBEDDED MEDIA DOES NOT PRECLUDE CONTACT WITH OTHER MEDIA. EMBEDDED MEDIA, AS A RESULT OF TIME INVESTED WITH THE UNIT AND GROUND RULES AGREEMENT, MAY HAVE A DIFFERENT LEVEL OF ACCESS.

3.U. CENTCOM/PA WILL ACCOUNT FOR EMBEDDED MEDIA DURING THE TIME THE MEDIA IS EMBEDDED IN THEATER. CENTCOM/PA WILL REPORT CHANGES IN EMBED STATUS TO OASD(PA) AS THEY OCCUR.

3.V. IF A MEDIA REPRESENTATIVE IS KILLED OR INJURED IN THE COURSE OF MILITARY OPERATIONS, THE UNIT WILL IMMEDIATELY NOTIFY OASD(PA), THROUGH PA CHANNELS. OASD(PA) WILL CONTACT THE RESPECTIVE MEDIA ORGANIZATION(S), WHICH WILL MAKE NEXT OF KIN NOTIFICATION IN ACCORDANCE WITH THE INDIVIDUAL'S WISHES.

3.W. MEDIA MAY TERMINATE THEIR EMBED OPPORTUNITY AT ANY TIME. UNIT COMMANDERS WILL PROVIDE, AS THE TACTICAL SITUATION PERMITS AND BASED ON THE AVAILABILITY OF TRANSPORTATION, MOVEMENT BACK TO THE NEAREST LOCATION WITH COMMERCIAL TRANSPORTATION.

3.W.1. DEPARTING MEDIA WILL BE DEBRIEFED ON OPERATIONAL SECURITY CONSIDERATIONS AS APPLICABLE TO ONGOING AND FUTURE OPERATIONS WHICH THEY MAY NOW HAVE INFORMATION CONCERNING.

4. GROUND RULES. FOR THE SAFETY AND SECURITY OF U.S. FORCES AND EMBEDDED MEDIA, MEDIA WILL ADHERE TO ESTABLISHED GROUND RULES. GROUND RULES WILL BE AGREED TO IN ADVANCE AND SIGNED BY MEDIA PRIOR TO EMBEDDING. VIOLATION OF THE GROUND RULES MAY RESULT IN THE IMMEDIATE TERMINATION OF THE EMBED AND REMOVAL FROM THE AOR. THESE GROUND RULES RECOGNIZE THE RIGHT OF THE MEDIA TO COVER MILITARY OPERATIONS AND ARE IN NO WAY INTENDED TO PREVENT RELEASE OF DEROGATORY, EMBARRASSING, NEGATIVE OR UNCOMPLIMENTARY INFORMATION. ANY MODIFICATION TO THE STANDARD GROUND RULES WILL BE FORWARDED THROUGH THE PA CHANNELS TO CENTCOM/PA FOR APPROVAL. STANDARD GROUND RULES ARE:

4.A. ALL INTERVIEWS WITH SERVICE MEMBERS WILL BE ON THE RECORD. SECURITY AT THE SOURCE IS THE POLICY. INTERVIEWS WITH PILOTS AND AIRCREW MEMBERS ARE AUTHORIZED UPON COMPLETION OF MISSIONS; HOWEVER, RELEASE OF INFORMATION MUST CONFORM TO THESE MEDIA GROUND RULES.

4.B. PRINT OR BROADCAST STORIES WILL BE DATELINED ACCORDING TO LOCAL GROUND RULES. LOCAL GROUND RULES WILL BE COORDINATED THROUGH COMMAND CHANNELS WITH CENTCOM.

4.C. MEDIA EMBEDDED WITH U.S. FORCES ARE NOT PERMITTED TO CARRY PERSONAL FIREARMS.

4.D. LIGHT DISCIPLINE RESTRICTIONS WILL BE FOLLOWED. VISIBLE LIGHT SOURCES, INCLUDING FLASH OR TELEVISION LIGHTS, FLASH CAMERAS WILL NOT BE USED WHEN OPERATING WITH FORCES AT NIGHT UNLESS SPECIFICALLY APPROVED IN ADVANCE BY THE ON-SCENE COMMANDER.

4.E. EMBARGOES MAY BE IMPOSED TO PROTECT OPERATIONAL SECURITY. EMBARGOES WILL ONLY BE USED FOR OPERATIONAL SECURITY AND WILL BE LIFTED AS SOON AS THE OPERATIONAL SECURITY ISSUE HAS PASSED.

4.F. THE FOLLOWING CATEGORIES OF INFORMATION ARE RELEASABLE.

4.F.1. APPROXIMATE FRIENDLY FORCE STRENGTH FIGURES.

4.F.2. APPROXIMATE FRIENDLY CASUALTY FIGURES BY SERVICE. EMBEDDED MEDIA MAY, WITHIN OPSEC LIMITS, CONFIRM UNIT CASUALTIES THEY HAVE WITNESSED.

4.F.3. CONFIRMED FIGURES OF ENEMY PERSONNEL DETAINED OR CAPTURED.

4.F.4. SIZE OF FRIENDLY FORCE PARTICIPATING IN AN ACTION OR OPERATION CAN BE DISCLOSED USING APPROXIMATE TERMS. SPECIFIC FORCE OR UNIT IDENTIFICATION MAY BE RELEASED WHEN IT NO LONGER WARRANTS SECURITY PROTECTION.

4.F.5. INFORMATION AND LOCATION OF MILITARY TARGETS AND OBJECTIVES PREVIOUSLY UNDER ATTACK.

4.F.6. GENERIC DESCRIPTION OF ORIGIN OF AIR OPERATIONS, SUCH AS "LAND-BASED."

4.F.7. DATE, TIME OR LOCATION OF PREVIOUS CONVENTIONAL MILITARY MISSIONS AND ACTIONS, AS WELL AS MISSION RESULTS ARE RELEASABLE ONLY IF DESCRIBED IN GENERAL TERMS.

4.F.8. TYPES OF ORDNANCE EXPENDED IN GENERAL TERMS.

4.F.9. NUMBER OF AERIAL COMBAT OR RECONNAISSANCE MISSIONS OR SORTIES FLOWN IN CENTCOM'S AREA OF OPERATION.

4.F.10. TYPE OF FORCES INVOLVED (E.G., AIR DEFENSE, INFANTRY, ARMOR, MARINES).

4.F.11. ALLIED PARTICIPATION BY TYPE OF OPERATION (SHIPS, AIRCRAFT, GROUND UNITS, ETC.) AFTER APPROVAL OF THE ALLIED UNIT COMMANDER.

4.F.12. OPERATION CODE NAMES.

4.F.13. NAMES AND HOMETOWNS OF U.S. MILITARY UNITS.

4.F.14. SERVICE MEMBERS' NAMES AND HOME TOWNS WITH THE INDIVIDUALS' CONSENT.

4.G. THE FOLLOWING CATEGORIES OF INFORMATION ARE NOT RELEASABLE SINCE THEIR PUBLICATION OR BROADCAST COULD JEOPARDIZE OPERATIONS AND ENDANGER LIVES.

4.G.1. SPECIFIC NUMBER OF TROOPS IN UNITS BELOW CORPS/MEF LEVEL.

4.G.2. SPECIFIC NUMBER OF AIRCRAFT IN UNITS AT OR BELOW THE AIR EXPEDITIONARY WING LEVEL.

4.G.3. SPECIFIC NUMBERS REGARDING OTHER EQUIPMENT OR CRITICAL SUPPLIES (E.G. ARTILLERY, TANKS, LANDING CRAFT, RADARS, TRUCKS, WATER, ETC.).

4.G.4. SPECIFIC NUMBERS OF SHIPS IN UNITS BELOW THE CARRIER BATTLE GROUP LEVEL.

4.G.5. NAMES OF MILITARY INSTALLATIONS OR SPECIFIC GEOGRAPHIC LOCATIONS OF MILITARY UNITS IN THE CENTCOM AREA OF RESPONSIBILITY, UNLESS SPECIFICALLY RELEASED BY THE DEPARTMENT OF DEFENSE OR AUTHORIZED BY THE CENTCOM COMMANDER. NEWS AND IMAGERY PRODUCTS THAT IDENTIFY OR INCLUDE IDENTIFIABLE FEATURES OF THESE LOCATIONS ARE NOT AUTHORIZED FOR RELEASE.

4.G.6. INFORMATION REGARDING FUTURE OPERATIONS.

4.G.7. INFORMATION REGARDING FORCE PROTECTION MEASURES AT MILITARY INSTALLATIONS OR ENCAMPMENTS (EXCEPT THOSE WHICH ARE VISIBLE OR READILY APPARENT).

4.G.8. PHOTOGRAPHY SHOWING LEVEL OF SECURITY AT MILITARY INSTALLATIONS OR ENCAMPMENTS.

4.G.9. RULES OF ENGAGEMENT.

4.G.10. INFORMATION ON INTELLIGENCE COLLECTION ACTIVITIES COMPROMISING TACTICS, TECHNIQUES OR PROCEDURES.

4.G.11. EXTRA PRECAUTIONS IN REPORTING WILL BE REQUIRED AT THE COMMENCEMENT OF HOSTILITIES TO MAXIMIZE OPERATIONAL SURPRISE. LIVE BROADCASTS FROM AIRFIELDS, ON THE GROUND OR AFLOAT, BY EMBEDDED MEDIA ARE PROHIBITED UNTIL THE SAFE RETURN OF THE INITIAL STRIKE PACKAGE OR UNTIL AUTHORIZED BY THE UNIT COMMANDER.

4.G.12. DURING AN OPERATION, SPECIFIC INFORMATION ON FRIENDLY FORCE TROOP MOVEMENTS, TACTICAL DEPLOYMENTS, AND DISPOSITIONS THAT WOULD JEOPARDIZE OPERATIONAL SECURITY OR LIVES. INFORMATION ON ON-GOING ENGAGEMENTS WILL NOT BE RELEASED UNLESS AUTHORIZED FOR RELEASE BY ON-SCENE COMMANDER.

4.G.13. INFORMATION ON SPECIAL OPERATIONS UNITS, UNIQUE OPERATIONS METHODOLOGY OR TACTICS, FOR EXAMPLE, AIR OPERATIONS, ANGLES OF ATTACK, AND SPEEDS; NAVAL TACTICAL OR EVASIVE MANEUVERS, ETC. GENERAL TERMS SUCH AS "LOW" OR "FAST" MAY BE USED.

4.G.14. INFORMATION ON EFFECTIVENESS OF ENEMY ELECTRONIC WARFARE.

4.G.15. INFORMATION IDENTIFYING POSTPONED OR CANCELED OPERATIONS.

4.G.16. INFORMATION ON MISSING OR DOWNED AIRCRAFT OR MISSING VESSELS WHILE SEARCH AND RESCUE AND RECOVERY OPERATIONS ARE BEING PLANNED OR UNDERWAY.

4.G.17. INFORMATION ON EFFECTIVENESS OF ENEMY CAMOUFLAGE, COVER, DECEPTION, TARGETING, DIRECT AND INDIRECT FIRE, INTELLIGENCE COLLECTION, OR SECURITY MEASURES.

4.G.18. NO PHOTOGRAPHS OR OTHER VISUAL MEDIA SHOWING AN ENEMY PRISONER OF WAR OR DETAINEE'S RECOGNIZABLE FACE, NAMETAG OR OTHER IDENTIFYING FEATURE OR ITEM MAY BE TAKEN.

4.G.19. STILL OR VIDEO IMAGERY OF CUSTODY OPERATIONS OR INTERVIEWS WITH PERSONS UNDER CUSTODY.

4.H. THE FOLLOWING PROCEDURES AND POLICIES APPLY TO COVERAGE OF WOUNDED, INJURED, AND ILL PERSONNEL:

4.H.1. MEDIA REPRESENTATIVES WILL BE REMINDED OF THE SENSITIVITY OF USING NAMES OF INDIVIDUAL CASUALTIES OR PHOTOGRAPHS THEY MAY HAVE TAKEN WHICH CLEARLY IDENTIFY CASUALTIES UNTIL AFTER NOTIFICATION OF THE NOK AND RELEASE BY OASD(PA).

4.H.2. BATTLEFIELD CASUALTIES MAY BE COVERED BY EMBEDDED MEDIA AS LONG AS THE SERVICE MEMBER'S IDENTITY IS PROTECTED FROM DISCLOSURE FOR 72 HOURS OR UPON VERIFICATION OF NOK NOTIFICATION, WHICHEVER IS FIRST.

4.H.3. MEDIA VISITS TO MEDICAL FACILITIES WILL BE IN ACCORDANCE WITH APPLICABLE REGULATIONS, STANDARD OPERATING PROCEDURES, OPERATIONS ORDERS AND INSTRUCTIONS BY ATTENDING PHYSICIANS. IF APPROVED, SERVICE OR MEDICAL FACILITY PERSONNEL MUST ESCORT MEDIA AT ALL TIMES.

4.H.4. PATIENT WELFARE, PATIENT PRIVACY, AND NEXT OF KIN/FAMILY CONSIDERATIONS ARE THE GOVERNING CONCERNS ABOUT NEWS MEDIA COVERAGE OF WOUNDED, INJURED, AND ILL PERSONNEL IN MEDICAL TREATMENT FACILITIES OR OTHER CASUALTY COLLECTION AND TREATMENT LOCATIONS.

4.H.5. MEDIA VISITS ARE AUTHORIZED TO MEDICAL CARE FACILITIES, BUT MUST BE APPROVED BY THE MEDICAL FACILITY COMMANDER AND ATTENDING PHYSICIAN AND MUST NOT INTERFERE WITH MEDICAL TREATMENT. REQUESTS TO VISIT MEDICAL CARE FACILITIES OUTSIDE THE CONTINENTAL UNITED STATES WILL BE COORDINATED BY THE UNIFIED COMMAND PA.

4.H.6. REPORTERS MAY VISIT THOSE AREAS DESIGNATED BY THE FACILITY COMMANDER, BUT WILL NOT BE ALLOWED IN OPERATING ROOMS DURING OPERATING PROCEDURES.

4.H.7. PERMISSION TO INTERVIEW OR PHOTOGRAPH A PATIENT WILL BE GRANTED ONLY WITH THE CONSENT OF THE ATTENDING PHYSICIAN OR FACILITY COMMANDER AND WITH THE PATIENT'S INFORMED CONSENT, WITNESSED BY THE ESCORT.

4.H.8. "INFORMED CONSENT" MEANS THE PATIENT UNDERSTANDS HIS OR HER PICTURE AND COMMENTS ARE BEING COLLECTED FOR NEWS MEDIA PURPOSES AND THEY MAY APPEAR NATIONWIDE IN NEWS MEDIA REPORTS.

4.H.9. THE ATTENDING PHYSICIAN OR ESCORT SHOULD ADVISE THE SERVICE MEMBER IF NOK HAVE BEEN NOTIFIED.

5. IMMUNIZATIONS AND PERSONAL PROTECTIVE GEAR.

5.A. MEDIA ORGANIZATIONS SHOULD ENSURE THAT MEDIA ARE PROPERLY IMMUNIZED BEFORE EMBEDDING WITH UNITS. THE CENTERS FOR DISEASE CONTROL (CDC)-RECOMMENDED IMMUNIZATIONS FOR DEPLOYMENT TO THE MIDDLE EAST INCLUDE HEPATITIS A; HEPATITIS B; RABIES; TETANUS-DIPHTHERIA; AND TYPHOID. THE CDC RECOMMENDS MENINGOCOCCAL IMMUNIZATIONS FOR VISITORS TO MECCA. IF TRAVELING TO CERTAIN AREAS IN THE CENTCOM AOR, THE CDC RECOMMENDS TAKING PRESCRIPTION ANTIMALARIAL DRUGS. ANTHRAX AND SMALLPOX VACCINES WILL BE PROVIDED TO THE MEDIA AT NO EXPENSE TO THE GOVERNMENT (THE MEDIA

OUTLET WILL BEAR THE EXPENSE). FOR MORE HEALTH INFORMATION FOR TRAVELERS TO THE MIDDLE EAST, GO TO THE CDC WEB SITE AT HTTP://WWW.CDC.GOV/TRAVEL/MIDEAST.HTM.

5.B. BECAUSE THE USE OF PERSONAL PROTECTIVE GEAR, SUCH AS HELMETS OR FLAK VESTS, IS BOTH A PERSONAL AND PROFESSIONAL CHOICE, MEDIA WILL BE RESPONSIBLE FOR PROCURING/USING SUCH EQUIPMENT. PERSONAL PROTECTIVE GEAR, AS WELL AS CLOTHING, WILL BE SUBDUED IN COLOR AND APPEARANCE.

5.C. EMBEDDED MEDIA ARE AUTHORIZED AND REQUIRED TO BE PROVIDED WITH, ON A TEMPORARY LOAN BASIS, NUCLEAR, BIOLOGICAL, CHEMICAL (NBC) PROTECTIVE EQUIPMENT BY THE UNIT WITH WHICH THEY ARE EMBEDDED. UNIT PERSONNEL WILL PROVIDE BASIC INSTRUCTION IN THE PROPER WEAR, USE, AND MAINTENANCE OF THE EQUIPMENT. UPON TERMINATION OF THE EMBED, INITIATED BY EITHER PARTY, THE NBC EQUIPMENT SHALL BE RETURNED TO THE EMBEDDING UNIT. IF SUFFICIENT NBC PROTECTIVE EQUIPMENT IS NOT AVAILABLE FOR EMBEDDED MEDIA, COMMANDERS MAY PURCHASE ADDITIONAL EQUIPMENT, WITH FUNDS NORMALLY AVAILABLE FOR THAT PURPOSE, AND LOAN IT TO EMBEDDED MEDIA IN ACCORDANCE WITH THIS PARAGRAPH.

6. SECURITY

6.A. MEDIA PRODUCTS WILL NOT BE SUBJECT TO SECURITY REVIEW OR CENSORSHIP EXCEPT AS INDICATED IN PARA. 6.A.1. SECURITY AT THE SOURCE WILL BE THE RULE. U.S. MILITARY PERSONNEL SHALL PROTECT CLASSIFIED INFORMATION FROM UNAUTHORIZED OR INADVERTENT DISCLOSURE. MEDIA PROVIDED ACCESS TO SENSITIVE INFORMATION, INFORMATION WHICH IS NOT CLASSIFIED BUT WHICH MAY BE OF OPERATIONAL VALUE TO AN ADVERSARY OR WHEN COMBINED WITH OTHER UNCLASSIFIED INFORMATION MAY REVEAL CLASSIFIED INFORMATION, WILL BE INFORMED IN ADVANCE BY THE UNIT COMMANDER OR HIS/HER DESIGNATED REPRESENTATIVE OF THE RESTRICTIONS ON THE USE OR DISCLOSURE OF SUCH INFORMATION. WHEN IN DOUBT, MEDIA WILL CONSULT WITH THE UNIT COMMANDER OR HIS/HER DESIGNATED REPRESENTATIVE.

6.A.1. THE NATURE OF THE EMBEDDING PROCESS MAY INVOLVE OBSERVATION OF SENSITIVE INFORMATION, INCLUDING TROOP MOVEMENTS, BATTLE PREPARATIONS, MATERIEL CAPABILITIES AND VULNERABILITIES AND OTHER INFORMATION AS LISTED IN PARA. 4.G. WHEN A COMMANDER OR HIS/HER DESIGNATED REPRESENTATIVE HAS REASON TO BELIEVE THAT A MEDIA MEMBER WILL HAVE ACCESS TO THIS TYPE OF SENSITIVE INFORMATION, PRIOR TO ALLOWING SUCH ACCESS, HE/SHE WILL TAKE PRUDENT PRECAUTIONS TO ENSURE THE SECURITY OF THAT INFORMATION. THE PRIMARY SAFEGUARD WILL BE TO BRIEF MEDIA IN ADVANCE ABOUT

WHAT INFORMATION IS SENSITIVE AND WHAT THE PARAMETERS ARE FOR COVERING THIS TYPE OF INFORMATION. IF MEDIA ARE INADVERTENTLY EXPOSED TO SENSITIVE INFORMATION THEY SHOULD BE BRIEFED AFTER EXPOSURE ON WHAT INFORMATION THEY SHOULD AVOID COVERING. IN INSTANCES WHERE A UNIT COMMANDER OR THE DESIGNATED REPRESENTATIVE DETERMINES THAT COVERAGE OF A STORY WILL INVOLVE EXPOSURE TO SENSITIVE INFORMATION BEYOND THE SCOPE OF WHAT MAY BE PROTECTED BY PREBRIEFING OR DEBRIEFING, BUT COVERAGE OF WHICH IS IN THE BEST INTERESTS OF THE DOD, THE COMMANDER MAY OFFER ACCESS IF THE REPORTER AGREES TO A SECURITY REVIEW OF THEIR COVERAGE. AGREEMENT TO SECURITY REVIEW IN EXCHANGE FOR THIS TYPE OF ACCESS MUST BE STRICTLY VOLUNTARY AND IF THE REPORTER DOES NOT AGREE, THEN ACCESS MAY NOT BE GRANTED. IF A SECURITY REVIEW IS AGREED TO, IT WILL NOT INVOLVE ANY EDITORIAL CHANGES; IT WILL BE CONDUCTED SOLELY TO ENSURE THAT NO SENSITIVE OR CLASSIFIED INFORMATION IS INCLUDED IN THE PRODUCT. IF SUCH INFORMATION IS FOUND, THE MEDIA WILL BE ASKED TO REMOVE THAT INFORMATION FROM THE PRODUCT AND/OR EMBARGO THE PRODUCT UNTIL SUCH INFORMATION IS NO LONGER CLASSIFIED OR SENSITIVE. REVIEWS ARE TO BE DONE AS SOON AS PRACTICAL SO AS NOT TO INTERRUPT COMBAT OPERATIONS NOR DELAY REPORTING. IF THERE ARE DISPUTES RESULTING FROM THE SECURITY REVIEW PROCESS THEY MAY BE APPEALED THROUGH THE CHAIN OF COMMAND, OR THROUGH PA CHANNELS TO OASD/PA. THIS PARAGRAPH DOES NOT AUTHORIZE COMMANDERS TO ALLOW MEDIA ACCESS TO CLASSIFIED INFORMATION.

6.A.2. MEDIA PRODUCTS WILL NOT BE CONFISCATED OR OTHERWISE IMPOUNDED. IF IT IS BELIEVED THAT CLASSIFIED INFORMATION HAS BEEN COMPROMISED AND THE MEDIA REPRESENTATIVE REFUSES TO REMOVE THAT INFORMATION NOTIFY THE CPIC AND/OR OASD/PA AS SOON AS POSSIBLE SO THE ISSUE MAY BE ADDRESSED WITH THE MEDIA ORGANIZATION'S MANAGEMENT.

7. MISCELLANEOUS/COORDINATING INSTRUCTIONS:

7.A. OASD(PA) IS THE INITIAL EMBED AUTHORITY. EMBEDDING PROCEDURES AND ASSIGNMENT AUTHORITY MAY BE TRANSFERRED TO CENTCOM PA AT A LATER DATE. THIS AUTHORITY MAY BE FURTHER DELEGATED AT CENTCOM'S DISCRETION.

7.B. THIS GUIDANCE AUTHORIZES BLANKET APPROVAL FOR NON-LOCAL AND LOCAL MEDIA TRAVEL ABOARD DOD AIRLIFT FOR ALL EMBEDDED MEDIA ON A NO-COST, SPACE AVAILABLE BASIS. NO ADDITIONAL COSTS SHALL BE INCURRED BY THE GOVERNMENT TO PROVIDE ASSISTANCE IAW DODI 5410.15, PARA 3.4.

7.C. USE OF LIPSTICK AND HELMET-MOUNTED CAMERAS ON COMBAT SORTIES IS APPROVED AND ENCOURAGED TO THE GREATEST EXTENT POSSIBLE.

8. OASD(PA) POC FOR EMBEDDING MEDIA IS MAJ TIM BLAIR, DSN 227-1253, CMCL 703-697-1253, EMAIL TIMOTHY.BLAIR@OSD.MIL.

February 28, 2003

Memorandum for Commander, U.S. Army Corps of Engineers

From: Assistant Secretary of the Amy, Claude M. Bolton, Jr.

RE: No-Bid Contracts for Iraq Reconstruction

SECRET/NOFORN UNCLASSIFIED

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
ACQUISITION LOGISTICS AND TECHNOLOGY
103 ARMY PENTAGON
WASHINGTON DC 20310-0103

28 FEB 2003

REPLY TO ATTENTION OF

SAAL-PS

MEMORANDUM FOR COMMANDER, U.S. ARMY CORPS OF ENGINEERS
441 G ST., N.W., WASHINGTON, DC 20314-1000

SUBJECT: Justification and Approval (J&A) for Other Than Full and Open Competition for the Execution of the Contingency Support Plan

I have approved the enclosed J&A for Other Than Full and Open Competition for Execution of the Contingency Support Plan for repair and continuity of operations of the Iraqi Oil Infrastructure. I am returning the J&A for implementation.

Claude M. Bolton, Jr.
Claude M. Bolton, Jr.
Assistant Secretary of the Army
(Acquisition, Logistics and Technology)

Enclosure

SECRET/NOFORN UNCLASSIFIED

Printed on Recycled Paper

Classified by: OSD
Declassified on April 22, 2004 in accordance with: "Record of Review for Declassification and Determinations, Documents Related to Contract DACA63-03-D-0005"

UNCLASSIFIED

JUSTIFICATION REVIEW DOCUMENT FOR
OTHER THAN FULL AND OPEN COMPETITION
FOR THE EXECUTION OF THE CONTINGENCY SUPPORT PLAN

AUTHORITY: 10 U.S.C. 2304(c)(1) AMOUNT: As stated

Prepared by:
Mr. James Cullum — Phone: 214-767-2564
LRD District Counsel — Date: 14 February 2003

Technical Representative:
LTC Paul Roege — Phone: 214-767-2518
SWD Military Engineer — Date Reviewed: 14 February 2003

Requirements Representative:
LTC Paul Roege — Phone: 214-767-2518
SWD Military Engineer — Date Reviewed: 14 February 2003

Procuring Contracting Officer:
Mr. John Rodgers — Phone: 817-886-1048
Date Reviewed: 14 February 2003

REVIEWS: I have reviewed this justification and find it adequate to support other than full and open competition.

SWD Legal Counsel
Mr. Morris Tanner — Phone: 214-767-2564
Signature_____ Date: _____

Competition Advocate
Mr. Gordon Sumner — Phone: 214-767-2476
SWD Director of Contracting
Signature:_____ Date: _____

HQUSACE Office of Chief Counsel
for Mr. Robert M. Andersen
Signature Michael J. Adams Date: 17 FEB 2003

Principal Assistant Responsible for Contracting
Mrs. Bunnatine H. Greenhouse — Phone: 202-761-8642
Signature: Bunnatine H. Greenhouse Date: 27 February 2003
I Certify that this determination is based upon sufficient facts to support the use of other than full and open competition and that it is my opinion that the anticipated cost is fair and reasonable.

Head of the Contracting Activity
Robert B. Flowers
Lieutenant General, USA
Commanding
Signature: Robert B. Flowers Date: 28FEB03

UNCLASSIFIED

UNCLASSIFIED

# JUSTIFICATION REVIEW DOCUMENT FOR OTHER THAN FULL AND OPEN COMPETITION FOR THE EXECUTION OF THE CONTINGENCY SUPPORT PLAN

AUTHORITY: 10 U.S.C. 2304(c)(1) AMOUNT: As stated

Prepared by:
Mr. James Cullum
LRD District Counsel
Phone: 214-767-2564
Date: 14 February 2003

Technical Representative:
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SWD Military Engineer
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Date Reviewed: 14 February 2003

REVIEWS: I have reviewed this justification and find it adequate to support other than full and open competition.

SWD Legal Counsel
Mr. Morris Tanner
Signature: Morris D Tanner Jr
Phone: 214-767-2564
Date: 27 Feb 03

Competition Advocate
Mr. Gordon Sumner
SWD Director of Contracting
Signature: _____
Phone: 214-767-2476
Date: 27FEB03

HQUSACE Office of Chief Counsel
Mr. Robert M. Andersen
Signature_____
Date: _____

Principal Assistant Responsible for Contracting
Mrs. Bunnatine H. Greenhouse
Signature: _____
Phone: 202-761-8642
Date: _____

Head of the Contracting Activity
Robert B. Flowers
Lieutenant General, USA
Commanding
Signature: _____
Date: _____

UNCLASSIFIED

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# JUSTIFICATION FOR OTHER THAN FULL AND OPEN COMPETITION FOR EXECUTION OF THE CONTINGENCY SUPPORT PLAN

1. **Contracting Agency.** (U) US Army Corps of Engineers (USACE), Southwestern Division, Dallas, Texas.

2. **Description of Action.** (S/NF) This requirement for execution of the Contingency Support Plan (CSP) for Repair and Continuity of Operations of the Iraqi Oil Infrastructure is being restricted to Brown and Root Services (BRS), a division of Kellogg, Brown and Root (KBR), (referred to herein as KBR), and will result in a new cost-plus-award fee indefinite delivery/indefinite quantity (ID/IQ) contract under which task orders will be issued. The award is projected for 2nd quarter FY03. Operations and Maintenance, Army; Other Procurement, Army; Military Construction, Army; and/or funds specifically appropriated for this purpose will be used for this procurement. The period of performance is for two years with 3 one-year option periods. The purpose of this contract is to enable the Army to respond immediately to urgent requirements from the Commander, U.S. Central Command (USCENTCOM) to execute the CSP to support accomplishment of USCENTCOM's mission. KBR will provide the services described in the CSP, as and when directed to do so by task orders issued under this contract. The acquisition plan and the acquisition strategy are being staffed for PARC and AAE, or his designee, approval.

3. **Description of Supplies/Services.** (S/NF)

A. (S/NF) This contract shall be for execution of the CSP as required by task orders to be issued concurrent with or after contract award. The categories of work required may include, but will not be limited to: support additional planning; furnish and position equipment and personnel; establish initial operational control of facilities; extinguish oil well fires; assess damage to oil facilities and maritime and river oil spills; respond to oil spills; environmental remediation; associated with repair/restore mission; perform expedient restoration and system operation; reservoir management; perform deliberate oil system repair; start-up and operate oil system; repair product systems (gas, refining); start-up and operate product systems; distribute energy products within Iraq; and distribute energy products outside Iraq.

B. (S/NF) The rough order of magnitude (ROM) cost estimate for execution of the entire CSP ranges from a best case scenario ($2.2 billion over a 19-month period of performance) to a worst case scenario ($15.7 billion over a 72-month period of performance.

C. (U) It is anticipated that the sole source contract covered by this J&A will not exceed $7 billion and task orders issued within 2 years of contract award or



Classified by: OSD
Declassified on April 22, 2004 in accordance with: "Record of Review for Declassification and Determinations, Documents Related to Contract DACA63-03-D-0005"

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award of an option. Those task orders may be modified as required so long as they have not been completed. The remainder of the work will be completed under competitively procured contracts.

4. **Authority Cited.** (U) 10 USC 2304(c)(1) as implemented by Federal Acquisition Regulations (FAR) 6.302-1, "Only one responsible source and no other supplies or services will satisfy agency requirements."

5. **Reason for Authority Cited.** (S/NF)

A. (S/NF) CENTCOM identified a need for a CSP to describe how contractor support can be provided the Commander, USCENTCOM in the context of post-Saddam US military activity in Iraq to effect repairs and to maintain continuity of operations of the Iraqi energy infrastructure and all related systems and facilities. The CSP had to complement and be consistent with CENTCOM's operational plans (OPLAN) and the Army's Logistics Civil Augmentation Program (LOGCAP) logistics support plans that relate to the affected geographical area and missions.

B. (S/NF) In November 2002, KBR was determined to be the only source capable of developing a CSP in the time required. A task order was issued under the LOGCAP contract to develop and deliver the CSP. KBR received the task order November 11, 2002, and delivered the CSP 30 days later. Under an extension to the task order, KBR delivered a refined CSP on February 4, 2003 based on guidance from the client, the Energy Infrastructure Planning Group (EIPG), Office of the Undersecretary of Defense (Policy) [OUSD(P)].

C. (S/NF) On January 22, 2003, the Secretary of Defense (SECDEF) designated the Army as the executive agent for the execution of the CSP. The Secretary of Army memorandum, Subject: Executive Agent for Iraqi Oil Restoration S/NF dated February 13, 2003, designated the Commander, U.S. Army Corps of Engineers as the executive agent for this project in support of USCENTCOM.

D. (S/NF) With the imminent possibility of war with Iraq and the potential of the Iraqi forces starting oil fires or otherwise damaging their facilities, it is imperative to have a contract for the execution of the CSP ready for award as soon as possible but not later than 15 days from approval of this J&A. Any delay impairs CENTCOM's ability to accomplish their mission, which includes securing Iraq's oil and energy infrastructure in the event the U.S. becomes an occupying power and the overall responsibility for the repair, production and sale of the energy products. To maintain and implement the CSP, a contractor must be completely familiar with these plans and have access to the proprietary essential elements. KBR, by virtue of its familiarity with the CENTCOM OPLAN's, related Logistics Support Plans, and the CSP, is the only contractor that can satisfy a requirement for immediate execution of the CSP. KBR established an appropriate facility and a team of people with appropriate security clearances to

manage development of the CSP and to prepare the CSP, so it has a cadre of cleared individuals who have been cleared to the classified aspects of this project. Because the project remains classified, any other contractor would require substantial time to assure appropriate facility and employee clearances to enable their review of the CSP. Additionally, such actions would duplicate the planning and pre-positioning efforts already undertaken by KBR. No delay can be tolerated. In recognition of this requirement, the SECDEF directed in the January 22, 2003 memorandum that the Army "... negotiate, but not award, a contract for execution with the developer of the plan that can be awarded as soon as the Army receives direction to execute the plan." This requirement is restricted to a sole source due to the necessity that a contract be immediately available upon direction to execute the CSP in case armed conflict with Iraq occurs before a competition can be conducted as noted in paragraphs 6 and 7 below.

E. (S/NF) On February 14, 2003, the ASA(ALT) approved a sole source procurement involving the pre-positioning of equipment and personnel provided by KBR. A letter contract was issued that same day and some pre-positioned equipment and personnel are now arriving in the USCENTCOM area of responsibility. This pre-positioning will significantly reduce the time in which KBR can commence urgent tasks under the contract covered by this J&A, such as extinguishing well fires.

E. (S/NF) This acquisition meets the criteria of FAR 6.302-1(a)(2)(ii) (B) in that these highly specialized services are available only from KBR in the time available. For all the reasons covered above, KBR is the only contractor able to begin to execute the CSP immediately upon receiving a notice to proceed. Award of a contract to any other source will result in unacceptable delays estimated to be a minimum of 4 months to 9 months in fulfilling the agency's requirements. This will include delays in extinguishing oil well fires, remediating environmental damage, and all work required for resumption or continuation of the operation of the Iraqi oil infrastructure. Because the Iraqi economy depends on oil revenue, the well-being of the Iraqi people depends on continuity of oil production and distribution. Any delays in providing support required by USCENTCOM will result in significant negative international repercussions.

6. Efforts to Obtain Competition. (S/NF) A January 22, 2003 memorandum approved by the Secretary of Defense designated the Army as the Executive Agent to execute a CSP in support of USCENTCOM's mission. As mentioned in paragraph 5 above, one of the directed tasks was to negotiate a contract for execution with the developer of the plan so there would be a capability to execute, should hostilities begin in the very near term. Another task was for the Executive Agent to plan for competition for the execution effort at the earliest reasonable opportunity consistent with the needs of the mission. Upon completion of the negotiations to execute the CSP upon short notice, we will obtain approval of an acquisition strategy which will include all actions to date

related to this requirement and the future competition. This future competition will either be restricted due to the classified program or be a full and open competition if the program is declassified.

7. Actions to Increase Competition. (S/NF) The USACE, as the Executive Agent, is planning to compete the execution effort for the CSP at the earliest reasonable opportunity consistent with the needs of the mission, and coordinating the acquisition strategy with ASA(ALT) and USD (AT&L).

8. Market Survey. (S/NF) Prior to issuing the task order for development of the CSP, limited consultation with industry indicated that very few firms were capable of executing a mission of this type and magnitude. The potential sources identified were KBR, Bechtel and Fluor. Due to the time-sensitive classified need for the development and the execution of the CSP, as well as the need for a contractor to have in-depth familiarity with CENTCOM and LOGCAP plans, it was determined that only KBR, as the LOGCAP III contractor, had the capability to develop and execute the CSP in the time required. Development of the CSP was within the scope of the LOGCAP contract. Market research will be conducted to support development of the acquisition strategy for competitive procurement of the execution effort.

9. Interested Sources. (U)

A. (U) Only a few contractors have the capability to perform this requirement, and even they would require substantial time to assemble project teams, assure appropriate security clearances for facilities and employees, become familiar with the CSP, related CENTCOM and LOGCAP plans, and prepare a proposal. Due to the fact that this is a classified procurement, and that the requirement has not previously been publicized, only KBR has been informed of this requirement (see paragraph 6, above).

B. (U) In accordance with FAR 5.202(a)(1), no synopsis will be issued to prevent disclosure of classified information that would compromise national security. The classified nature of the requirement prevents discussing it with any firms not already cleared and read in on the project.

10. Other Factors. (S/NF)

A. (S/NF) Procurement history – There have been two task orders executed related to the CSP by the U.S. Army Joint Munitions Command under the ID/IQ LOGCAP III contract DAAA09-02-D-0007. The LOGCAP III contract was awarded to KBR in December 2001 as a result of a competitive procurement. The first task order 0031, issued November 11, 2002, required development of the CSP. The total dollar value, including the task order extension for delivery of a refined CSP by February 4, 2003, was $2 million. The second task order 0042 was issued on February 14, 2003 for an estimated $65.1 million to include

options for pre-positioning resources for Iraq oil restoration. This second task order was outside of the scope of the LOGCAP III contract and was approved as a sole source action by the Army Acquisition Executive on February 14, 2003. The justification was based on KBR's development of the CSP and its familiarity with the CENTCOM OPLAN's, related Logistics Support Plans and the CSP. Under the circumstances, award to any other source would result in unacceptable delays in fulfilling the agency's requirements.

B. Acquisition data availability. (U) All non-proprietary data generated by KBR in developing the CSP or in any follow-on task orders awarded to do additional planning, pre-positioning, or execution will be made available for use in the procurement of a competitively procured follow-on contract.

11. Subcontracting competition. (U) The Contractor will develop a subcontracting plan for different elements of the performance required under this contract. The contractor will purchase materials, goods, and services to the greatest extent practicable on a competitive basis from responsive, responsible suppliers and subcontractors to effectively perform the contract in the most cost effective manner possible. The contract will contain FAR clause 52.244-5, "Competition in Subcontracting", which requires competition to the maximum extent practical.

UNCLASSIFIED

11. Technical Certification. (U) I certify that the supporting data which are included in the J&A, are accurate and complete to the best of my information, knowledge and belief.

Name: Paul Roege, Lt. Col, USA Date: 27 FEB 03

Title: SWD Military Engineer Signature: for

12. Requirements Certification. (U) I certify that the supporting data which are included in the J&A, are accurate and complete to the best of my information knowledge and belief.

Name: Paul Roege, Lt. Col, USA Date: 27 FEB 03

Title: SWD Military Engineer Signature: for

13. Fair and Reasonable Cost Determination. (U) This is a CPAF IDIQ task order contract. Costs will be continuously monitored to insure they are fair and reasonable and are properly allocated to this contract. I therefore hereby determine that the anticipated cost for this contract action, will be fair and reasonable.

Name: John Rodgers Date: 2/27/03

Title: Contracting Officer Signature:

14. Procurement Contracting Officer Certification. (U) I certify that the information within this J&A is accurate and complete to the best of my information, knowledge and belief.

Name: John Rodgers Date: 2/27/03

Title: Contracting Officer Signature:

~~SECRET/NOFORN~~ UNCLASSIFIED

28 FEB 2003

APPROVAL OF JUSTIFICATION AND APPROVAL
FOR OTHER THAN FULL AND OPEN COMPETITION FOR
EXECUTION OF THE CONTINGENCY SUPPORT PLAN

(S/NF) Based on the foregoing justification, I hereby approve the procurement for execution of the contingency support plan for repair and continuity of operations of the Iraqi Oil Infrastructure on an other than full and open competition basis pursuant to the authority of 10 U.S.C. 2304(c)(1), subject to the availability of funds, and provided that the services and property herein described have otherwise been authorized for acquisition. The total estimated value of the contract is $7,000,000,000.00.

Date: 28 FEB 2003

C. Claude M. Bolton, Jr.

Claude M. Bolton, Jr.
Assistant Secretary of the Army
(Acquisition, Logistics and Technology)

~~SECRET/NOFORN~~ UNCLASSIFIED

Classified by: OSD
Declassified on April 22, 2004 in accordance with: "Record of Review for Declassification and Determinations, Documents Related to Contract DACA63-03-D-0005"

April 4, 2003

Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations

DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: Assessment of Legal, Historical, Policy and Operational Considerations

UNCLASSIFIED
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UNCLASSIFIED WHEN SEPARATED FROM ATTACHMENT

# Working Group Report
# on
# Detainee Interrogations in the Global War on Terrorism:
# Assessment of Legal, Historical, Policy, and Operational Considerations

~~April 4, 2003~~

Classified by: Secretary Rumsfeld
Reason: 1.5(C)
Declassify on: 10 years

Declassify Under the Authority of Executive Order 12958
By Executive Secretary, Office of the Secretary of Defense
William P. Marriott, CAPT, USN
June 21, 2004

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[redacted]
from Diana Davi
DTF 5006-0

# DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM:
## Assessment of Legal, Historical, Policy and Operational Considerations

## I. Introduction

(U) ~~(SAF)~~ On January 15, 2003, the Secretary of Defense (SECDEF), directed the General Counsel of the Department of Defense (DOD GC) to establish a working group within the Department of Defense (DOD) to assess the legal, policy, and operational issues relating to the interrogations of detainees held by the United States Armed Forces in the war on terrorism. Attachment 1.

(U) ~~(SAF)~~ On January 16, 2003, the DOD GC asked the General Counsel of the Department of the Air Force to convene this working group, comprised of representatives of the following entities: the Office of the Undersecretary of Defense (Policy), the Defense Intelligence Agency, the General Counsels of the Air Force, Army, and Navy and Counsel to the Commandant of the Marine Corps, the Judge Advocates General of the Air Force, Army, Navy, and Marines, and the Joint Staff Legal Counsel and J5. Attachment 2. The following assessment is the result of the collaborative efforts of those organizations, after consideration of diverse views, and was informed by a Department of Justice opinion.

(U) ~~(SAF)~~ In preparing this assessment, it was understood that military members, civilian employees of the United States, and contractor employees currently participate in interrogations of detainees. Further, those who participate in the decision processes are comprised of military personnel and civilians.

(U) Our review is limited to the legal and policy considerations applicable to interrogation techniques applied to unlawful combatants in the Global War on Terrorism interrogated outside the sovereign territory of the United States by DOD personnel in DOD interrogation facilities. Interrogations can be broadly divided into two categories, strategic and tactical. This document addresses only strategic interrogations that are those conducted: (i) at a fixed location created for that purpose; (ii) by a task force or higher level component; and (iii) other than in direct and immediate support of on-going military operations. All tactical interrogations, including battlefield interrogations, remain governed by existing doctrine and procedures and are not directly affected by this review.

(U) In considering interrogation techniques for possible application to unlawful combatants in the "strategic" category, it became apparent that those techniques could be divided into three types: (i) routine (those that have been ordinarily used by interrogators for routine interrogations), (ii) techniques comparable to the first type but not formally recognized, and (iii) more aggressive counter-resistance techniques than would be used in routine interrogations. The third type would only be appropriate when presented with a resistant detainee who there is good reason to believe possesses critical intelligence.

Many of the techniques of the second and third types have been requested for approval by USSOUTHCOM and USCENTCOM. The working group's conclusions regarding these three types of techniques, including recommendations for appropriate safeguards, are presented at the end of this report.

(U) This assessment comes in the context of a major threat to the security of the United States by terrorist forces who have demonstrated a ruthless disregard for even minimal standards of civilized behavior, with a focused intent to inflict maximum casualties on the United States and its people, including its civilian population. In this context, intelligence regarding their capabilities and intentions is of vital interest to the United States and its friends and allies. Effective interrogations of those unlawful combatants who are under the control of the United States have proven to be and will remain a critical source of this information necessary to national security.

(U) Pursuant to the Confidential Presidential Determination, dated February 7, 2002 (Humane Treatment of al Qaida and Taliban Detainees), the President determined that members of al-Qaida and the Taliban are unlawful combatants and therefore are not entitled to the protections of the Geneva Conventions as prisoners of war or otherwise. However, as a matter of policy, the President has directed U.S. Armed Forces to treat al-Qaida and Taliban detainees "humanely" and "to the extent appropriate and consistent with military necessity, in a manner consistent with the principles" of the Geneva Conventions. Due to the unique nature of the war on terrorism in which the enemy covertly attacks innocent civilian populations without warning, and further due to the critical nature of the information believed to be known by certain of the al-Qaida and Taliban detainees regarding future terrorist attacks, it may be appropriate for the appropriate approval authority to authorize as a military necessity the interrogation of such unlawful combatants in a manner beyond that which may be applied to a prisoner of war who is subject to the protections of the Geneva Conventions.

(U) In considering this issue, it became apparent that any recommendations and decisions must take into account the international and domestic law, past practices and pronouncements of the United States, DOD policy considerations, practical interrogation considerations, the views of other nations, and the potential impacts on the United States, its Armed Forces generally, individual interrogators, and those responsible for authorizing and directing specific interrogation techniques.

(U) We were asked specifically to recommend techniques that comply with all applicable law and are believed consistent with policy considerations not only of the United States but which may be unique to DOD. Accordingly, we undertook that analysis and conducted a technique-specific review that has produced a summary chart (Attachment 3) for use in identifying the recommended techniques.

## II. International Law

(U) The following discussion addresses the requirements of international law, as it pertains to the Armed Forces of the United States, as interpreted by the United States. As will be apparent in other sections of this analysis, other nations and international

bodies may take a more restrictive view, which may affect our policy analysis. These views are addressed in the "Considerations Affecting Policy" section below.

## A. The Geneva Conventions

(U) The laws of war contain obligations relevant to the issue of interrogation techniques and methods. It should be noted, however, that it is the position of the U.S. Government that none of the provisions of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Third Geneva Convention) apply to al Qaida detainees because, *inter alia*, al Qaida is not a High Contracting Party to the Convention.[1] As to the Taliban, the U.S. position is that the provisions of Geneva apply to our present conflict with the Taliban, but that Taliban detainees do not qualify as prisoners of war under Article 4 of the Geneva Convention.[2] The Department of Justice has advised that the Geneva Convention Relative to the Protection of Civilian Personnel in time of War (Fourth Geneva Convention) does not apply to unlawful combatants.

## B. The 1994 Convention Against Torture

(U) The United States' primary obligation concerning torture and related practices derives from the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (commonly referred to as "the Torture Convention"). The United States ratified the Convention in 1994, but did so with a variety of Reservations and Understandings.

(U) Article 1 of the Convention defines the term "torture" for purpose of the treaty.[3] The United States conditioned its ratification of the treaty on an understanding that:

> ...in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the

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[1] (U) The President determined that "none of the provisions of Geneva apply to our conflict with al-Qaida in Afghanistan or elsewhere throughout the world because, among other reasons, al-Qaida is not a High Contracting Party to Geneva." Confidential Presidential Determination, subject: Humane Treatment of al Qaida and Taliban Detainees, dated Feb. 7, 2002.

[2] (U) The President determined that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." *Id.*

[3] (U) Article 1 provides: "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[4]

(U) Article 2 of the Convention requires the Parties to "take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under its jurisdiction." The U. S. Government believed existing state and federal criminal law was adequate to fulfill this obligation, and did not enact implementing legislation. Article 2 also provides that acts of torture cannot be justified on the grounds of exigent circumstances, such as a state of war or public emergency, or on orders from a superior officer or public authority.[5] The United States did not have an Understanding or Reservation relating to this provision (however the U.S. issued a Declaration stating that Article 2 is not self-executing).

(U) Article 3 of the Convention contains an obligation not to expel, return, or extradite a person to another state where there are "substantial grounds" for believing that the person would be in danger of being subjected to torture. The U. S. understanding relating to this article is that it only applies "if it is more likely than not" that the person would be tortured.

(U) Under Article 5, the Parties are obligated to establish jurisdiction over acts of torture when committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state, or by its nationals wherever committed. The U.S. has criminal jurisdiction over territories under U.S. jurisdiction and onboard U.S. registered ships and aircraft by virtue of the special maritime and territorial jurisdiction of the United States (the "SMTJ") established under 18 U.S.C. § 7. Acts that would constitute torture are likely to be criminal acts under the SMTJ as discussed in Section III.A.2 below. Accordingly, the U. S. has satisfied its obligation to establish jurisdiction over such acts in territories under U.S. jurisdiction or on board a U.S. registered ship or aircraft. However, the additional requirement of Article 5 concerning jurisdiction over acts of torture by U.S. nationals "wherever committed" needed legislative implementation. Chapter 113C of Title 18 of the U.S. Code provides federal criminal jurisdiction over an extraterritorial act or attempted act of torture if the offender is a U.S. national. The statute defines "torture" consistent with the U.S. Understanding on Article 1 of the Torture Convention.

(U) The United States is obligated under Article 10 of the Convention to ensure that law enforcement and military personnel involved in interrogations are educated and informed regarding the prohibition against torture. Under Article 11, systematic reviews of interrogation rules, methods, and practices are also required.

(U) In addition to torture, the Convention prohibits cruel, inhuman and degrading treatment or punishment within territories under a Party's jurisdiction (Art 16). Primarily because the meaning of the term "cruel, inhuman and degrading treatment or

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[4] (U) 18 U.S.C. § 2340 tracks this language. For a further discussion of the U.S. understandings and reservations, see the Initial Report of the U.S. to the U.N. Committee Against Torture, dated October 15, 1999.

[5] (U) See discussion in the Domestic Law section on the necessity defense.

punishment" was vague and ambiguous, the United States imposed a Reservation on this article to the effect that it is bound only to the extent that such treatment or punishment means the cruel, unusual and inhumane treatment or punishment prohibited by the 5th, 8th, and 14th Amendments to the U.S. Constitution (see discussion *infra*, in the Domestic Law section).

(U) In sum, the obligations under the Torture Convention apply to the interrogation of unlawful combatant detainees, but the Torture Convention prohibits torture only as defined in the U.S. Understanding, and prohibits "cruel, inhuman, and degrading treatment and punishment" only to the extent of the U.S. Reservation relating to the U.S. Constitution.

(U) An additional treaty to which the United States is a party is the International Covenant on Political and Civil Rights, ratified by the United States in 1992. Article 7 of this treaty provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The United States' ratification of the Covenant was subject to a Reservation that "the United States considers itself bound by Article 7 only to the extent that cruel, inhuman, or degrading treatment or punishment means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Under this treaty, a "Human Rights Committee" may, with the consent of the Party in question, consider allegations that such Party is not fulfilling its obligations under the Covenant. The United States has maintained consistently that the Covenant does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict.

### C. Customary International Law

(U) The Department of Justice has concluded that customary international law cannot bind the Executive Branch under the Constitution because it is not federal law.[6] In particular, the Department of Justice has opined that "under clear Supreme Court precedent, any presidential decision in the current conflict concerning the detention and trial of al-Qaida or Taliban militia prisoners would constitute a "controlling" Executive act that would immediately and completely override any customary international law."[7]

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[6](U) Memorandum dated January 22, 2002, *Re: Application of Treaties and Laws to al-Qaida and Taliban Detainees* at 32.

[7] (U) Memorandum dated January 22, 2002, *Re: Application of Treaties and Laws to al-Qaida and Taliban Detainees* at 35.

# III. Domestic Law

## A. Federal Criminal Law

### 1. Torture Statute

(U) 18 U.S.C. § 2340 defines as torture any "*act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain....*" The intent required is the intent to inflict severe physical or mental pain. 18 U.S.C. § 2340A requires that the offense occur "outside the United States." Jurisdiction over the offense extends to any national of the United States or any alleged offender present in the United States, and could, therefore, reach military members, civilian employees of the United States, or contractor employees.[8] The "United States" is defined to include all areas under the jurisdiction of the United States, including the special maritime and territorial jurisdiction (SMTJ) of the United States. SMTJ is a statutory creation[9] that extends the criminal jurisdiction of the United States for designated crimes to defined areas.[10] The effect is to grant federal court criminal jurisdiction for the specifically identified crimes.

(U) The USA Patriot Act (2001) amended the definition of the SMTJ to add subsection 9, which provides:

> "With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act –
>
> (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of maintaining those missions or entities, irrespective of ownership; and
>
> (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

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[8] (U) Section 2340A provides, "*Whoever outside* the United States commits or attempts to commit torture shall be fined or imprisoned..." (emphasis added).

[9] (U) 18 USC § 7, "Special maritime and territorial jurisdiction of the United States" includes any lands under the exclusive or concurrent jurisdiction of the United States.

[10] (U) Several paragraphs of 18 USC §7 are relevant to the issue at hand. Paragraph 7(3) provides: [SMTJ includes:] "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place...." Paragraph 7(7) provides: [SMTJ includes:] "Any place outside the jurisdiction of any nation to an offense by or against a national of the United States." Similarly, paragraphs 7(1) and 7(5) extend SMTJ jurisdiction to, "the high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, and any vessel belonging in whole or in part to the United States..." and to "any aircraft belonging in whole or in part to the United States ... while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State."

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.

(U) By its terms, the plain language of new subsection 9 includes Guantanamo Bay Naval Station (GTMO) within the definition of the SMTJ, and accordingly makes GTMO within the United States for purposes of § 2340. As such, the Torture Statute does not apply to the conduct of U.S. personnel at GTMO. Prior to passage of the Patriot Act in 2001, GTMO was still considered within the SMTJ as manifested by (i) the prosecution of civilian dependents and employees living in GTMO in Federal District Courts based on SMTJ jurisdiction, and (ii) a Department of Justice opinion[11] to that effect.

(U) Any person who commits an enumerated offense in a location that is considered within the special maritime and territorial jurisdiction is subject to the jurisdiction of the United States.

(U) For the purposes of this discussion, it is assumed that an interrogation done for official purposes is under "color of law" and that detainees are in DOD's custody or control.

(U) Although Section 2340 does not apply to interrogations at GTMO, it could apply to U.S. operations outside U.S. jurisdiction, depending on the facts and circumstances of each case involved. The following analysis is relevant to such activities.

(U) To convict a defendant of torture, the prosecution must establish that: (1) the torture occurred outside the United States; (2) the defendant acted under color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) that the act inflicted severe physical or mental pain or suffering. *See also* S. Exec. Rep. No. 101-30, at 6 (1990). ("For an act to be 'torture,' it must...cause severe pain and suffering, and be intended to cause severe pain and suffering.")

**a. "Specifically Intended"**

(U) To violate Section 2340A, the statute requires that severe pain and suffering must be inflicted with specific intent. *See* 18 U.S.C. § 2340(1). In order for a defendant to have acted with specific intent, he must have expressly intended to achieve the forbidden act. *See United States v. Carter*, 530 U.S. 255, 269 (2000); Black's Law Dictionary at 814 (7th ed. 1999) (defining specific intent as "[t]he intent to accomplish the precise criminal act that one is later charged with"). For example, in *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994), the statute at issue was construed to require that the

[11] (U) 6 Op. OLC 236 (1982). The issue was the status of GTMO for purposes of a statute banning slot-machines on "any land where the United States government exercises exclusive or concurrent jurisdiction."

defendant act with the "specific intent to commit the crime." (Internal quotation marks and citation omitted). As a result, the defendant had to act with the express "purpose to disobey the law" in order for the *mens rea* element to be satisfied. *Ibid.* (Internal quotation marks and citation omitted.)

(U) Here, because Section 2340 requires that a defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant's precise objective. If the statute had required only general intent, it would be sufficient to establish guilt by showing that the defendant "possessed knowledge with respect to the *actus reus* of the crime." *Carter*, 530 U.S. at 268. If the defendant acted knowing that severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent. *See id* at 269; Black's Law Dictionary: 813 (7th ed. 1999) (explaining that general intent "usu[ally] takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)"). The Supreme Court has used the following example to illustrate the difference between these two mental states:

> [A] person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying "general intent"), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy "specific intent").

*Carter*, 530 U.S. at 268 (citing 1 W. Lafave & A. Scott, Substantive Criminal Law § 3.5, at 315 (1986).

(U) As a theoretical matter, therefore, knowledge alone that a particular result is certain to occur does not constitute specific intent. As the Supreme Court explained in the context of murder, "the...common law of homicide distinguishes...between a person who knows that another person will be killed as a result of his conduct and a person who acts with the specific purpose of taking another's life[.]" *United States v. Bailey*, 444 U.S. 394, 405 (1980). "Put differently, the law distinguishes actions taken 'because of' a given end from actions taken 'in spite' of their unintended but foreseen consequences." *Vacco v. Quill*, 521 U.S. 793, 802-03 (1997). Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control. While as a theoretical matter such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present. *See, e.g., United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001); *United States v. Karro*, 257 F.3d 112, 118 (2d Cir. 2001); *United States v. Wood*, 207 F.3d 1222, 1232 (10th Cir. 2000); *Henderson v. United States*, 202 F.2d 400, 403 (6th Cir.1953). Therefore, when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent.

(U) Further, a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent. *See, e.g., South Atl. Lmtd. Ptrshp. of Tenn v. Reise,* 218 F.3d 518, 531 (4th Cir. 2002). Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct. *See Cheek v. United States,* 498 U.S. 192, 202 (1991); *United States v. Mancuso,* 42 F.3d 836, 837 (4th Cir. 1994). For example, in the context of mail fraud, if an individual honestly believes that the material transmitted is truthful, he has not acted with the required intent to deceive or mislead. *See, e.g., United States v. Sayakhom,* 186 F.3d 928, 939-40 (9th Cir. 1999). A good faith belief need not be a reasonable one. *See Cheek,* 498 U.S. at 202.

(U) Although a defendant theoretically could hold an unreasonable belief that his acts would not constitute the actions prohibited by the statute, even though they would as a certainty produce the prohibited effects, as a matter of practice in the federal criminal justice system, it is highly unlikely that a jury would acquit in such a situation. Where a defendant holds an unreasonable belief, he will confront the problem of proving to the jury that he actually held that belief. As the Supreme Court noted in *Cheek,* "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury...will find that the Government has carried its burden of proving knowledge." *Id* at 203-04. As explained above, a jury will be permitted to infer that the defendant held the requisite specific intent. As a matter of proof, therefore, a good faith defense will prove more compelling when a reasonable basis exists for the defendant's belief.

**b. "Severe Pain or Suffering"**

(U) The key statutory phrase in the definition of torture is the statement that acts amount to torture if they cause "severe physical or mental pain or suffering." In examining the meaning of a statute, its text must be the starting point. *See INS* v. *Phinpathya,* 464 U.S. 183, 189 (1984) ("This Court has noted on numerous occasions that in all cases involving statutory construction, our starting point must be the language employed by Congress...and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.") (internal quotations and citations omitted). Section 2340 makes plain that the infliction of pain or suffering per se, whether it is physical or mental, is insufficient to amount to torture. Instead, the text provides that pain or suffering must be "severe." The statute does not, however, define the term "severe." "In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer,* 510 U.S. 471, 476 (1994). The dictionary defines "severe" as "[u]nsparing in exaction, punishment, or censure" or "[i]nflicting discomfort or pain hard to endure; sharp; afflictive; distressing; violent; extreme; as *severe* pain, anguish, torture." Webster's New International Dictionary 2295 (2d ed. 1935); *see* American Heritage Dictionary of the English Language 1653 (3d ed. 1992) ("extremely violent or grievous: *severe* pain") (emphasis in original); IX The Oxford English Dictionary" 572 (1978) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "of circumstances... hard to sustain or endure"). Thus, the adjective "severe" conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure.

c. "Severe mental pain or suffering"

(U) Section 2340 gives further guidance as to the meaning of "severe mental pain or suffering," as distinguished from severe physical pain and suffering. The statute defines "severe mental pain or suffering" as:

> the prolonged mental harm caused by or resulting from--
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2). In order to prove "severe mental pain or suffering," the statute requires proof of "prolonged mental harm" that was caused by or resulted from one of four enumerated acts. We consider each of these elements.

*i. "Prolonged Mental Harm"*

(U) As an initial matter, Section 2340(2) requires that the severe mental pain must be evidenced by "prolonged mental harm." To prolong is to "lengthen in time" or to "extend the duration of, to draw out." Webster's Third New International Dictionary 1815 (1988); Webster's New International Dictionary 1980 (2d ed. 1935). Accordingly, "prolong" adds a temporal dimension to the harm to the individual, namely, that the harm must be one that is endured over some period of time. Put another way, the acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage. For example, the mental strain experienced by an individual during a lengthy and intense interrogation, such as one that state or local police might conduct upon a criminal suspect, would not violate Section 2340(2). On the other hand, the development of a mental disorder such as posttraumatic stress disorder, which can last months or even years, or even chronic depression, which also can last for a considerable period of time if untreated, might satisfy the prolonged harm requirement. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 426, 439-45 (4th ed. 1994) ("DSM-IV"). *See also* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 509 (1997) (noting that posttraumatic stress disorder is frequently found in torture victims); *cf* Sana Loue, *Immigration Law and Health* § 10:46 (2001) (recommending evaluating for post-traumatic stress disorder immigrant-client

who has experienced torture).[12] By contrast to "severe pain" the phrase "prolonged mental harm" appears nowhere else in the U.S. Code nor does it appear in relevant medical literature or international human rights reports.

(U) Not only must the mental harm be prolonged to amount to severe mental pain and suffering, but also it must be caused by or result from one of the acts listed in the statute. In the absence of a catchall provision, the most natural reading of the predicate acts listed in Section 2340(2)(A)(D) is that Congress intended the list to be exhaustive. In other words, other acts not included within Section 2340(2)'s enumeration are not within the statutory prohibition. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*"); Norman Singer, 2A Sutherland on Statutory Construction § 47.23 (6th ed. 2000) ("[W]here a form of conduct the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.") (footnotes omitted). We conclude that torture within the meaning of the statute requires the specific intent to cause prolonged mental harm by one of the acts listed in Section 2340(2).

(U) A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture. It could be argued that a defendant needs to have specific intent only to commit the predicate acts that give rise to prolonged mental harm. Under that view, so long as the defendant specifically intended to, for example, threaten a victim with imminent death, he would have had sufficient *mens rea* for a conviction. According to this view, it would be further necessary for a conviction to show only that the victim factually suffered prolonged mental harm, rather than that the defendant intended to cause it. We believe that this approach is contrary to the text of the statute. The statute requires that the defendant specifically intend to inflict severe mental pain or suffering. Because the statute requires this mental state with respect to the infliction of severe mental pain and because it expressly defines severe mental pain in terms of prolonged mental harm, that mental state must be present with respect to prolonged mental harm. To read the statute otherwise would read the phrase "prolonged mental harm caused by or resulting from" out of the definition of "severe mental pain or suffering."

(U) A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not

[12] The DSM-IV explains that posttraumatic disorder ("PTSD") is brought on by exposure to traumatic events, such as serious physical injury or witnessing the deaths of others and during those events the individual felt "intense fear" or "horror." *Id* at 424. Those suffering from this disorder re-experience the trauma through, *inter alia*, "recurrent and intrusive distressing recollections of the event", "recurrent distressing dreams of the event", or "intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event." *Id.* at 428. Additionally, a person with PTSD "[p]ersistent[ly]" avoids stimuli associated with the trauma, including avoiding conversations about the trauma, places that stimulate recollections about the trauma, and they experience a numbing of general responsiveness, such as a "restricted range of affect (e,g., unable to have loving feelings)", and "the feeling of detachment or estrangement from others." *Ibid.* Finally, an individual with PTSD has "[p]ersistent symptoms of increased arousal," as evidenced by "irritability or outbursts of anger," "hypervigilance," "exaggerated startle response," and difficulty sleeping or concentrating. *Ibid.*

amount to the acts prohibited by the statute. Thus, if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture. A defendant could show that he acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience. *See, e.g., Ratzlaf,* 510 *U.S.* at 142 n.10 (noting that where the statute required that the defendant act with the specific intent to violate the law, the specific intent element "might be negated by, e.g., proof that defendant relied in good faith on advice of counsel.") (citations omitted). All of these steps would show that he has drawn on the relevant body of knowledge concerning the result proscribed by the statute, namely prolonged mental harm. Because the presence of good faith would negate the specific intent element of torture, good faith may be a complete defense to such a charge. *See, e.g., United States* v. *Wall,* 130 F.3d 739, 746 (6th Cir. 1997); *United States* v. *Casperson,* 773 F.2d 216,222-23 (8th Cir.1985).

***ii. Harm Caused By Or Resulting From Predicate Acts***

(U) Section 2340(2) sets forth four basic categories of predicate acts. The first category is the "intentional infliction or threatened infliction of severe physical pain or suffering." This might at first appear superfluous because the statute already provides that the infliction of severe physical pain or suffering can amount to torture. This provision, however, actually captures the infliction of physical pain or suffering when the defendant inflicts physical pain or suffering with general intent rather than the specific intent that is required where severe physical pain or suffering alone is the basis for the charge. Hence, this subsection reaches the infliction of severe physical pain or suffering when it is only the means of causing prolonged mental harm. Or put another way, a defendant has committed torture when he intentionally inflicts severe physical pain or suffering with the specific intent of causing prolonged mental harm. As for the acts themselves, acts that cause "severe physical pain or suffering" can satisfy this provision.

(U) Additionally, the threat of inflicting such pain is a predicate act under the statute. A threat may be implicit or explicit. *See, e.g., United States* v. *Sachdev,* 279 F.3d 25, 29 (1st Cir. 2002). In criminal law, courts generally determine whether an individual's words or actions constitute a threat by examining whether a reasonable person in the same circumstances would conclude that a threat had been made. *See,* e.g., *Watts* v. *United States,* 394 *U.S.* 70S, 708 (1969) (holding that whether a statement constituted a threat against the president's life had to be determined in light of all the surrounding circumstances); *Sachdev,* 279 F.3d at 29 ("a reasonable person in defendant's position would perceive there to be a threat, explicit or implicit, of physical injury"); *United States v. Khorrami,* 895 F.2d 1186, 1190 (7th Cir. 1990) (to establish that a threat was made, the statement must be made "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon [another individual]") (citation and internal quotation marks omitted); *United States v. Peterson,* 483 F.2d 1222, 1230 (D.C. Cir. 1973) (perception of threat of imminent harm necessary to establish self-defense had to be "objectively reasonable in light of the surrounding circumstances"). Based on this common approach,

we believe that the existence of a threat of severe pain or suffering should be assessed from the standpoint of a reasonable person in the same circumstances.

(U) Second, Section 2340(2)(B) provides that prolonged mental harm, constituting torture, can be caused by "the administration or application or threatened administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality." The statute provides no further definition of what constitutes a mind-altering substance. The phrase "mind-altering substances" is found nowhere else in the U.S. Code, nor is it found in dictionaries. It is, however, a commonly use synonym for drugs. *See, e.g., United States v. Kingsley*, 241 F.3d 828, 834 (6th Cir.) (referring to controlled substances as "mind-altering substance[s]") *cert. denied*, 122 S. Ct. 137 (2001); *Hogue v. Johnson*, 131 F. 3rd 466, 501 (5th Cir. 1997) (referring to drugs and alcohol as "mind altering substance[s]"), *cert. denied*, 523 U.S. 1014 (1998). In addition, the phrase appears in a number of state statutes, and the context in which it appears confirms this understanding of the phrase. *See, e.g.,* Cal. Penal Code § 3500 (c) (West Supp. 2000) ("Psychotropic drugs also include mind-altering... drugs..."); Minn. Stat. Ann. § 260B.201(b) (West Supp. 2002) ("'chemical dependency treatment'" define as programs designed to "reduc[e] the risk of the use of alcohol, drugs, or other mind-altering substances").

(U) This subparagraph, section 2340(2)(B), however, does not preclude any and all use of drugs. Instead, it prohibits the use of drugs that "disrupt profoundly the senses or the personality." To be sure, one could argue that this phrase applies only to "other procedures," not the application of mind-altering substances. We reject this interpretation because the terms of Section 2340(2) expressly indicate that the qualifying phrase applies to both "other procedures" *and* the "application of mind-altering substances." The word "other" modifies "procedures calculated to disrupt profoundly the senses." As an adjective, "other" indicates that the term or phase it modifies is the remainder of several things. *See* Webster's Third New International Dictionary 1598 (1986) (defining "other" as "being the one (as of two or more) remaining or not included"). Or put another way, "other" signals that the words to which it attaches are of the same kind, type, or class as the more specific item previously listed. Moreover, where a statute couple words or phrases together, it "denotes an intention that they should be understood in the same general sense." Norman Singer, 2A Sutherland on Statutory Construction § 47:16 (6th ed. 2000); *see also Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). Thus, the pairing of mind-altering substances with procedures calculated to disrupt profoundly the sense or personality and the use of "other" to modify "procedures" shows that the use of such substances must also cause a profound disruption of the senses or personality.

(U) For drugs or procedures to rise to the level of "disrupt[ing] profoundly the sense or personality," they must produce an extreme effect. And by requiring that they be "calculated" to produce such an effect, the statute requires that the defendant has consciously designed the acts to produce such an effect. 28 U.S.C. § 2340(2)(B). The word "disrupt" is defined as "to break asunder; to part forcibly; rend," imbuing the verb

with a connotation of violence. Webster's New International Dictionary 753 (2d ed. 1935); *see* Webster's Third New International Dictionary 656 (1986) (defining disrupt as "to break apart: Rupture" or "destroy the unity or wholeness of"); IV the Oxford English Dictionary 832 (1989) (defining disrupt as "[t]o break or burst asunder; to break in pieces; to separate forcibly"). Moreover, disruption of the senses or personality alone is insufficient to fall within the scope of this subsection; instead, that disruption must be profound. The word "profound" has a number of meanings, all of which convey a significant depth. Webster's New International Dictionary 1977 (2d ed. 1935 defines profound as: "Of very great depth; extending far below the surface or top; unfathomable [;]...[c]oming from, reaching to, or situated at a depth or more than ordinary depth; not superficial; deep-seated; chiefly with reference to the body; as a *profound* sigh, wounded, or pain[;] . . .[c]haracterized by intensity, as of feeling or quality; deeply felt or realized; as, *profound* respect, fear, or melancholy; hence, encompassing; thoroughgoing; complete; as, *profound* sleep, silence, or ignorance." *See* Webster's Third New International Dictionary 1812 (1986) ("having very great depth: extending far below the surface. . .not superficial"). Random House Webster's Unabridged Dictionary 1545 (2d ed. 1999) also defines profound as "originating in or penetrating to the depths of one's being" or "pervasive or intense; thorough; complete" or "extending, situated, or originating far down, or far beneath the surface." By requiring that the procedures and the drugs create a *profound* disruption, the statute requires more than the acts "forcibility separate" or "rend" the senses or personality. Those acts must penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality.

(U) The phrase "disrupt profoundly the senses or personality" is not used in mental health literature nor is it derived from elsewhere in U.S. law. Nonetheless, we think the following examples would constitute a profound disruption of the senses or personality. Such an effect might be seen in a drug-induced dementia. In such a state, the individual suffers from significant memory impairment, such as the inability to retain any new information or recall information about things previously of interest to the individual. *See* DSM-IV at 134.[13] This impairment is accompanied by one or more of the following: deterioration of language function, e.g., repeating sounds or words over and over again; impaired ability to execute simple motor activities, e.g., inability to dress or wave goodbye; "[in]ability to recognize [and identify] objects such as chairs or pencils" despite normal visual functioning; or "[d]isturbances in executive level functioning", i.e., serious impairment of abstract thinking. *Id.* At 134-35. Similarly, we think that the onset of "brief psychotic disorder" would satisfy this standard. *See id.* at 302-03. In this disorder, the individual suffers psychotic symptoms, including among other things, delusions, hallucinations, or even a catatonic state. This can last for one day

[13] (U) Published by the American Psychiatric Association, and written as a collaboration of over a thousand psychiatrists, the DSM-IV is commonly used in U.S. courts as a source of information regarding mental health issues and is likely to be used in trial should charges be brought that allege this predicate act. *See, e.g., Atkins v. Virginia*, 122 S. Ct. 2242, 2245 n. 3 (2002); *Kansas v. Crane*, 122 S. Ct. 867, 871 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 359-60 (1997); *McClean v. Merrifield*, No. 00-CV-0120E(SC), 2002 WL 1477607 at *2 n.7 (W.D.N.Y. June 28, 2002); *Peeples v. Coastal Office Prods.*, 203 F. Supp 2d 432, 439 (D. Md 2002); *Lassiegne v. Taco Bell Corp.*, 202 F. Supp 2d 512, 519 (E.D. La. 2002).

or even one month. *See id.* We likewise think that the onset of obsessive-compulsive disorder behaviors would rise to this level. Obsessions are intrusive thoughts unrelated to reality. They are not simple worries, but are repeated doubts or even "aggressive or horrific impulses." *See id.* at 418. The DSM-IV further explains that compulsions include "repetitive behaviors (e.g., hand washing, ordering, checking)" and that "[b]y definition, [they] are either clearly excessive or are not connected in a realistic way with what they are designed to neutralize or prevent." *See id.* Such compulsions or obsessions must be "time-consuming." *See id* at 419. Moreover, we think that pushing someone to the brink of suicide (which could be evidenced by acts of self-mutilation), would be a sufficient disruption of the personality to constitute a "profound disruption." These examples, of course, are in no way intended to be an exhaustive list. Instead, they are merely intended to illustrate the sort of mental health effects that we believe would accompany an action severe enough to amount to one that "disrupt[s] profoundly the sense or the personality."

(U) The third predicate act listed in Section 2340(2) is threatening an individual with "imminent death." 18 U.S.C. § 2340(2)(C). The plain text makes clear that a threat of death alone is insufficient; the threat must indicate that death is "imminent." The "threat of imminent death" is found in the common law as an element of the defense of duress. *See Bailey*, 444 U.S. at 409. "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Common law cases and legislation generally define "imminence" as requiring that the threat be almost immediately forthcoming. 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.7, at 655 (1986). By contrast, threats referring vaguely to things that might happen in the future do not satisfy this immediacy requirement. *See United States v. Fiore*, 178 F. 3rd 917, 923 (7th Cir. 1999). Such a threat fails to satisfy this requirement not because it is too remote in time but because there is a lack of certainty that it will occur. Indeed, timing is an indicator of certainty that the harm will befall the defendant. Thus, a vague threat that someday the prisoner *might* be killed would not suffice. Instead, subjecting a prisoner to mock executions or playing Russian roulette with him would have sufficient immediacy to constitute a threat of imminent death. Additionally, as discussed earlier, we believe that the existence of a threat must be assessed from the perspective of a reasonable person in the same circumstances.

(U) Fourth, if the official threatens to do anything previously described to a third party, or commits such an act against a third party, that threat or action can serve as the necessary predicate for prolonged mental harm. *See* 18 U.S.C. § 2340(2)(D). The statute does not require any relationship between the prisoner and the third party.

## 2. Other Federal Crimes that Could Relate to Interrogation Techniques

(U) The following are federal crimes in the special maritime and territorial jurisdiction of the United States: murder (18 U.S.C. § 1111), manslaughter (18 U.S.C. § 1112), assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), kidnapping (18 U.S.C. § 1201). These, as well as war crimes (18 U.S.C. § 2441)[14] and conspiracy (18 U.S.C. § 371), are discussed below.

### a. Assaults within maritime and territorial jurisdiction, 18 U.S.C. § 113

(U) 18 U.S.C. § 113 proscribes assault within the special maritime and territorial jurisdiction. Although section 113 does not define assault, courts have construed the term "assault" in accordance with that term's common law meaning. *See, e.g., United States v. Estrada-Fernandez*, 150 F.3d 491, 494 n.1 (5th Cir. 1998); *United States v. Juvenile-Male*, 930 F.2d 727, 728 (9th Cir. 1991). At common law an assault is an attempted battery or an act that puts another person in reasonable apprehension of bodily harm. *See e.g., United States v. Bayes*, 210 F.3d 64, 68 (1st Cir. 2000). Section 113 reaches more than simple assault, sweeping within its ambit acts that would at common law constitute battery.

(U) 18 U.S.C. § 113 proscribes several specific forms of assault. Certain variations require specific intent, to wit: simple assault (fine and/or imprisonment for not more than six months); assault with intent to commit murder (imprisonment for not more than twenty years); assault with intent to commit any felony (except murder and certain sexual abuse offenses) (fine and/or imprisonment for not more than ten years); assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse (fine and/imprisonment for not more than ten years, or both). Other defined crimes require only general intent, to wit: assault by striking, beating, or wounding (fine and/or imprisonment for not more than six months); assault where the victim is an individual who has not attained the age of 16 years (fine and/or imprisonment for not more than 1 year); assault resulting in serious bodily injury (fine and/or imprisonment for not more than ten years); assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years (fine and/or imprisonment for not more than 5 years). "Substantial bodily injury" means bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty. "Serious bodily injury" means bodily injury which involves (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. "Bodily injury" means (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of

[14] (U) 18 U.S.C. § 2441 criminalizes the commission of war crimes by U.S. nationals and members of the U.S. Armed Forces. Subsection (c) defines war crimes as (1) grave breaches of any of the Geneva Conventions; (2) conduct prohibited by the Hague Convention IV, Respecting the Law and Customs of War on Land, signed 18 October 1907; or (3) conduct that constitutes a violation of common Article 3 of the Geneva Conventions. The Department of Justice has opined that this statute does not apply to conduct toward al-Qaida or Taliban operatives because the President has determined that they are not entitled to the protections of Geneva and the Hague Regulations.

the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary.

**b. Maiming, 18 U.S.C. § 114**

(U) Whoever with the intent to torture (as defined in section 2340), maims, or disfigures, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or whoever, and with like intent, throws or pours upon another person, any scalding water, corrosive acid, or caustic substance shall be fined and/or imprisoned not more than twenty years. This is a specific intent crime.

**c. Murder, 18 U.S.C. § 1111**

(U) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree. If within the SMTJ, whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life; whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life. Murder is a specific intent crime.

**d. Manslaughter, 18 U.S.C. § 1112**

(U) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: (A) voluntary, upon a sudden quarrel or heat of passion and (B) involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

(U) If within the SMTJ whoever is guilty of voluntary manslaughter, shall be fined and/or imprisoned not more than ten years; whoever is guilty of involuntary manslaughter, shall be fined and/or imprisoned not more than six years. Manslaughter is a general intent crime. A death resulting from the exceptional interrogation techniques may subject the interrogator to a charge of manslaughter, most likely of the involuntary sort.

**e. Interstate Stalking, 18 U.S.C. § 2261A**

(U) 18 U.S.C. § 2261A provides that "[w]hoever...travels...within the special maritime and territorial jurisdiction of the United States...with the intent to kill, injure, harass, or intimidate another person, and in the course of or as a result of, such travel

places that person in reasonable fear of the death of, or serious bodily injury of that person." Thus there are three elements to a violation of 2261A: (1) defendant traveled in interstate commerce; (2) he did so with the intent to injure, harass, intimidate another person; (3) the person he intended to harass or injure was reasonably placed in fear of death or serious bodily injury as a result of that travel. *See United States v. Al-Zubaidy,* 283 F.3d 804, 808 (6th Cir. 2002).

(U) The travel itself must have been undertaken with the specific intent to harass or intimidate another. Or put another way, at the time of the travel itself, the defendant must have engaged in that travel for the precise purpose of harassing another person. *See Al-Zubaidy,* 283 F.3d at 809 (the defendant "must have intended to harass or injure [the victim] at the time he crossed the state line").

(U) The third element is not fulfilled by the mere act of travel itself. *See United States v. Crawford,* No. 00-CR-59-B-S, 2001 WL 185140 (D. Me. Jan. 26, 2001) ("A plain reading of the statute makes clear that the statute requires the actor to place the victim in reasonable fear, rather than, as Defendant would have it, that his travel place the victim in reasonable fear.").

### f. Conspiracy, 18 U.S.C. § 2 and 18 U.S.C. § 371[15]

(U) Conspiracy to commit crime is a separate offense from crime that is the object of the conspiracy.[16] Therefore, where someone is charged with conspiracy, a conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute.[17]

(U) As the Supreme Court most recently stated, "the essence of a conspiracy is 'an agreement to commit an unlawful act.'" *United States* v. *Jimenez Recio,* --S.Ct. -, 2003 WL 139612 at *-- (Jan. 12, 2003) (quoting *Iannelli* v. *United States,* 420 U.S. 770, 777 (1975). Moreover, "[t]hat agreement is a 'distinct evil,' which 'may exist and be punished whether or not the substantive crime ensues.", *Id* at * (quoting *Salinas* v. *United States,* 522 U.S. 52. 65 (1997).

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[15] (U) 18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[16] (U) *United States v Rabinowich,* 238 US 78, 59, 35 S.Ct 682, L Ed 1211 (1915).

[17] (U) *United States v. Cangiano,* 491 F.2d 906 (2nd Cir. 1974), cert denied 419 U.S. 904 (1974).

### 3. Legal doctrines under the Federal Criminal Law that could render specific conduct, otherwise criminal, *not* unlawful

(U) Generally, the following discussion identifies legal doctrines and defenses applicable to the interrogation of unlawful combatants, and the decision process related to them. In practice, their efficacy as to any person or circumstance will be fact-dependent.

#### a. Commander-in-Chief Authority

(U) As the Supreme Court has recognized, and as we will explain further below, the President enjoys complete discretion in the exercise of his Commander-in-Chief authority including in conducting operations against hostile forces. Because both "[t]he executive power and the command of the military and naval forces is vested in the President," the Supreme Court has unanimously stated that it is *"the President alone* who is constitutionally invested with the *entire charge of hostile operations." Hamilton v. Dillin,* 88 U.S. (21 Wall.) 73, 87 (1874) (emphasis added).

(U) In light of the President's complete authority over the conduct of war, without a clear statement otherwise, criminal statutes are not read as infringing on the President's ultimate authority in these areas. The Supreme Court has established a canon of statutory construction that statutes are to be construed in a manner that avoids constitutional difficulties so long as a reasonable alternative construction is available. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 499-501, 504 (1979)) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe [a] statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") This canon of construction applies especially where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government. *See, e.g., Franklin* v. *Massachusetts,* 505 U.S. 788, 800-1 (1992) (citation omitted) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the [Administrative Procedure Act]. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."); *Public Citizen V. United States Dep't of Justice,* 491 U.S. 440, 465-67 (1989) (construing Federal Advisory Committee Act not to apply to advice given by American Bar Association to the President on judicial nominations, to avoid potential constitutional question regarding encroachment on Presidential power to appoint judges).

(U) In the area of foreign affairs, and war powers in particular, the avoidance canon has special force. *See, e.g., Dept of Navy* v. *Egan,* 484 U.S. 518, 530 (1988) ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); *Japan Whaling Ass 'n* v. *American Cetacean Socy,* 478 U.S. 221, 232-33 (1986) (construing federal statutes to avoid curtailment of traditional presidential

prerogatives in foreign affairs). It should not be lightly assumed that Congress has acted to interfere with the President's constitutionally superior position as Chief Executive and Commander-in-Chief in the area of military operations. *See Egan*, 484 U.S. at 529 (quoting *Haig* v. *Agee*, 1453 U.S. 280, 293-94 (1981). *See also Agee*, 453 U.S. at 291 (deference to Executive Branch is "especially" appropriate "in the area of national security").

(U) In order to respect the President's inherent constitutional authority to manage a military campaign, 18 U.S.C. § 2340A (the prohibition against torture) as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority. Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war. The President's power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander-in-Chief. A construction of Section 2340A that applied the provision to regulate the President's authority as Commander-in-Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions. Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we would construe Section 2340A to avoid this constitutional difficulty, and conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.

(U) This approach is consistent with previous decisions of the DOJ involving the application of federal criminal law. For example, DOJ has previously construed the congressional contempt statute as inapplicable to executive branch officials who refuse to comply with congressional subpoenas because of an assertion of executive privilege. In a 1984 opinion, DOJ concluded that

> if executive officials were subject to prosecution for criminal contempt whenever they carried out the President's claim of executive privilege, it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties. Therefore, the separation of powers principles that underlie the doctrine of executive privilege also would preclude an application of the contempt of Congress statute to punish officials for aiding the President in asserting his constitutional privilege.

*Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted A Claim of Executive Privilege*, 8 Op. O.L.C. 101, 134 (May 30, 1984). Likewise, if executive officials were subject to prosecution for conducting interrogations when they were carrying out the President's Commander-in-Chief powers, "it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties." These constitutional principles preclude an application of Section 2340A to punish officials for aiding the President in exercising his exclusive constitutional authorities. *Id.*

(U) It could be argued that Congress enacted 18 U.S.C. § 2340A with full knowledge and consideration of the President's Commander-in-Chief power, and that Congress intended to restrict his discretion; however, the Department of Justice could not enforce Section 2340A against federal officials acting pursuant to the President's constitutional authority to wage a military campaign. Indeed, in a different context, DOJ has concluded that both courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to one of the President's constitutional powers. DOJ, for example, has previously concluded that Congress could not constitutionally extend the congressional contempt statute to executive branch officials who refuse to comply with congressional subpoenas because of an assertion of executive privilege. They opined that "courts...would surely conclude that a criminal prosecution for the exercise of a presumptively valid, constitutionally based privilege is not consistent with the Constitution." 8 Op. O.L.C. at 141. Further, DOJ concluded that it could not bring a criminal prosecution against a defendant who had acted pursuant to an exercise of the President's constitutional power. "The President, through a United States Attorney, need not, indeed may not, prosecute criminally a subordinate for asserting on his behalf a claim of executive privilege. Nor could the Legislative Branch or the courts require or implement the prosecution of such an individual." *Id.* Although Congress may define federal crimes that the President, through the Take Care Clause, should prosecute, Congress cannot compel the President to prosecute outcomes taken pursuant to the President's own constitutional authority. If Congress could do so, it could control the President's authority through the manipulation of federal criminal law.

(U) There are even greater concerns with respect to prosecutions arising out of the exercise of the President's express authority as Commander-in-Chief than with prosecutions arising out of the assertion of executive privilege. In a series of opinions examining various legal questions arising after September 11, 2001, DOJ explained the scope of the President's Commander-in-Chief power. We briefly summarize the findings of those opinions here. The President's constitutional power to protect the security of the United States and the lives and safety of its people must be understood in light of the Founders' intention to create a federal government "cloathed with all the powers requisite to the complete execution of its trust." *The Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because "the circumstances which may affect the public safety" are not reducible within certain determinate limits,

> it must be admitted, as necessary consequence, that there can be no limitation of that authority, which is to provide for the defense and protection of the community, in any matter essential to its efficacy.

*Id.* at 147-48. Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the nation and its interests in accordance "with the realistic purposes of the entire instrument." *Lichter v. United States,* 334 U.S. 742, 782 (1948).

(U) The text, structure, and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of United States in situations of grave and unforeseen emergencies. The decision to deploy military force in the defense of United States interests is expressly placed under Presidential Authority by the Vesting Clause, U.S. Const. Art. I, § 1, cl. 1, and by the Commander-in-Chief Clause, *id.*, § 2, cl. 1.[18] DOJ has long understood the Commander-in-Chief Clause in particular as an affirmative grant of authority to the President. The Framers understood the Clause as investing the President with the fullest range of power understood at the time of the ratification of the Constitution as belonging to the military commander. In addition, the Structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive which includes the conduct of warfare and the defense of the nation unless expressly assigned in the Constitution to Congress, is vested in the President. Article II, Section 1 makes this clear by stating that the "executive Power shall be vested in a President of the United States of America." That sweeping grant vests in the President an unenumerated "executive power" and contrasts with the specific enumeration of the powers-those "herein" granted to Congress in Article I. The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions require the unity in purpose and energy in action that characterize the Presidency rather than Congress.[19]

(U) As the Supreme Court has recognized, the Commander-in-Chief power and the President's obligation to protect the nation imply the ancillary powers necessary to

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[18] (U) *See Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950) (President has authority to deploy United States armed forces "abroad or to any particular region"); *Fleming v. Page*, 50 U.S. (9 How) 603, 614-15 (1950) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual") *Loving* v. *United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (The inherent powers of the Commander-in-Chief "are clearly extensive."); *Maul* v. *United States*, 274 U.S. 501, 515-16 (1927) (Brandeis & Holmes, JJ., concurring) (President "may direct any revenue cutter to cruise in any water in order to perform any duty of the service"); *Commonwealth Massachusetts* v. *Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (the President has "power as Commander-in-Chief to station forces abroad"); *Ex parte Vallandigham*, 28 F.Cas. 874, 922 (C.C.S.D. Ohio (1863) (No. 16,816) (in acting "under this power where there is no express legislative declaration, the president is guided solely by his own judgment land discretion"); *Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6,6 (Dec. 4,1992) (Barr, Attorney General).*

[19] (U) Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack. As Justice Joseph Story said long ago, "[I]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws." *The Apollon*, 22 U.S. (9 Wheat) 362, 366-67 (1824). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat with whatever means are necessary. *See e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion or a foreign nation, the President is not only authorized but bound to resist force by force...without waiting for any special legislative authority."); *United States* v. *Smith*, 27 F.Cas; 1192,1229-30 (C.C.D.N.Y, 1.–06) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization. it is "the duty ...of the executive magistrate ...to repel an invading foe") *see also 3* Story, *Commentaries* § 1485 ("[t]he command and application of the public force...to maintain peace, and to resist foreign invasion" are executive powers).

their successful exercise. "The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And of course, the grant of war power includes all that is necessary and proper for carrying those powers into execution." *Johnson* v. *Eisentrager*, 339 U.S. 763, 788 (1950). In wartime, it is for the President alone to decide what methods to use to best prevail against the enemy. The President's complete discretion in exercising the Commander-in-Chief power has been recognized by the courts. In the *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862), for example, the Court explained that whether the President, "in fulfilling his duties as Commander in Chief", had appropriately responded to the rebellion of the southern states was a question "to be *decided by him*" and which the Court could not question, but must leave to "the political department of the Government to which this power was entrusted."

(U) One of the core functions of the Commander-in-Chief is that of capturing, detaining, and interrogating members of the enemy. It is well settled that the President may seize and detain enemy combatants, at least for the duration of the conflict, and the laws of war make clear that prisoners may be interrogated for information concerning the enemy, its strength, and its plans. Numerous Presidents have ordered the capture, detention, and questioning of enemy combatants during virtually every major conflict in the Nation's history, including recent conflicts in Korea, Vietnam, and the Persian Gulf. Recognizing this authority, Congress has never attempted to restrict or interfere with the President's authority on this score.

(U) Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President. There can be little doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign. Indeed, such operations may be of more importance in a war with an international terrorist organization than one with the conventional armed forces of a nation-state, due to the former's emphasis on secret operations and surprise attacks against civilians. It may be the case that only successful interrogations can provide the information necessary to prevent the success of covert terrorist attacks upon the United States and its citizens. Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategy or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

(U) As this authority is inherent in the President, it would be appropriate within the context of the war on terrorism for this authority to be stated expressly in a Presidential directive or other writing.[20]

[20] (U) Although application of the Commander-in-Chief authority does not require a specific written directive, as an evidentiary matter a written Presidential directive or other document would serve to memorialize the authority.

b. Necessity

(U) The defense of necessity could be raised, under the current circumstances, to an allegation of a violation of a criminal statute. Often referred to as the "choice of evils" defense, necessity has been defined as follows:

> Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Model Penal Code § 3.02. *See also* Wayne R. LaFave & Austin W. Scott, 1 Substantive Criminal Law § 5.4 at 627 (1986 & 2002 supp.) ("LaFave & Scott"). Although there is no federal statute that generally establishes necessity or other justifications as defenses to federal criminal laws, the Supreme Court has recognized the defense. *See United States v. Bailey,* 444 U.S. 394, 410 (1980) (relying on LaFave & Scott and Model Penal Code definitions of necessity defense).

(U) The necessity defense may prove especially relevant in the current circumstances. As it has been described in the case law and literature, the purpose behind necessity is one of public policy. According to LaFave & Scott, "the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." LaFave & Scott, at 629. In particular, the necessity defense can justify the intentional killing of one person to save two others because "it is better that two lives be saved and one lost than that two be lost and one saved." *Id.* Or, put in the language of a choice of evils, "the evil involved in violating the terms of the criminal law (...even taking another's life) may be less than that which would result from literal compliance with the law (...two lives lost)." *Id.*

(U) Additional elements of the necessity defense are worth noting here. First, the defense is not limited to certain types of harms. Therefore, the harm inflicted by necessity may include intentional homicide, so long as the harm avoided is greater (i.e., preventing more deaths) *Id.* at 634. Second, it must actually be the defendant's intention to avoid the greater harm; intending to commit murder and then learning only later that the death had the fortuitous result of saving other lives will not support a necessity defense. *Id.* at 635. Third, if the defendant reasonably believes that the lesser harm as necessary, even if, unknown to him, it was not, he may still avail himself of the defense. As LaFave and Scott explain, "if A kills B reasonably believing it to be necessary to save C and D, he is not guilty of murder even though, unknown to A, C and D could have been

rescued without the necessity of killing B." *Id.* Fourth, it is for the court, and not the defendant to judge whether the harm avoided outweighed the harm done. *Id. at* 636. Fifth, the defendant cannot rely upon the necessity defense if a third alternative that will cause less harm is open and known to him.

(U) Although not every interrogation that could violate the provisions of Section 2340A or other potentially applicable statutes would trigger a necessity defense, it appears that under the current circumstances there may be support for such defense. On September 11, 2001, al Qaida launched a surprise covert attack on civilian targets in the United States that led to the deaths of thousands and financial losses in the billions of dollars. According to public and governmental reports, al Qaida has other sleeper cells within the United States that may be planning similar attacks. Indeed, al Qaida's plans apparently include efforts to develop and deploy chemical, biological, and nuclear weapons of mass destruction. Under these circumstances, a detainee may possess information that could enable the United States to prevent attacks that potentially could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.

(U) Under this rationale, two factors will help indicate when the necessity defense could appropriately be invoked. First, the more certain that government officials are that a particular individual has information needed to prevent an attack, the more necessary interrogation will be. Second, the more likely it appears that a terrorist attack is likely to occur, and the greater the amount of damage expected from such an attack, the more that an interrogation to get information would become necessary. Of course, the strength of the necessity defense depends on the circumstances that prevail, and the knowledge of the government actors involved, when the interrogation is conducted. While every interrogation that might violate Section 2340A or other potentially applicable statutes does not trigger a necessity defense, we can say that certain circumstances could support such a defense.

(U) Legal authorities identify an important exception to the necessity defense. The defense is available "only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values." *Id.* at 629. Thus, if Congress explicitly has made clear that violation of a statute cannot be outweighed by the harm avoided, courts cannot recognize the necessity defense. LaFave and Israel provide as an example an abortion statute that made clear that abortions even to save the life of the mother would still be a crime; in such cases the necessity defense would be unavailable. *Id.* at 630. Here, however, Congress has not explicitly made a determination of values vis-a-vis torture. In fact, Congress explicitly removed efforts to remove torture from the weighing of values permitted by the necessity defense.[21]

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[21] In the CAT, torture is defined as the intentional infliction of severe pain or suffering "for such purposes as obtaining from him or a third person information or a confession." CAT art 1.1. One could argue that such a definition represented an attempt to indicate that the good of obtaining information--no matter what the circumstances--could not justify an act of torture. In other words, necessity would not be a defense. In

c. Self-Defense

(U) Even if a court were to find that necessity did not justify the violation of a criminal statute, a defendant could still appropriately raise a claim of self-defense. The right to self-defense, even when it involves deadly force, is deeply embedded in our law, both as to individuals and as to the nation as a whole. As the Court of Appeals for the D.C. Circuit has explained:

> More than two centuries ago, Blackstone, best known of the expositors of the English common law taught that "all homicide is malicious, and of course amounts to murder, unless...excused on the account of accident or self-preservation." Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time.

*United States* v. *Peterson*, 483 F.2d 1222, 1228-29 (D.C. Cir. 1973). Self-defense is a common-law defense to federal criminal law offenses, and nothing in the text, structure or history of Section 2340A precludes its application to a charge of torture. In the absence of any textual provision to the contrary, we assume self-defense can be an appropriate defense to an allegation of torture.

(U) The doctrine of self-defense permits the use of force to prevent harm to another person. As LaFave and Scott explain, one is justified in using reasonable force in defense of another person, even a stranger, when he reasonably believes that the other is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger." *Id.* at 663-64. Ultimately, even deadly force is permissible, but "only when the attack of the adversary upon the other, person reasonably appears to the defender to be a deadly attack." *Id.* at 664. As with our discussion of necessity, we will review the significant elements of this defense.[22] According to LaFave and Scott, the elements of the defense of others are the same as those that apply to individual self-defense.

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enacting Section 2340, however, Congress removed the purpose element in the definition of torture, evidencing an intention to remove any fixing of values by statute. By leaving Section 2340 silent as to the harm done by torture in comparison to other harms, Congress allowed the necessity defense to apply when appropriate.

Further, the CAT contains an additional provision that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture," CAT art. 2.2. Aware of this provision of the treaty and of the definition of the necessity defense that allows the legislature to provide *for* an exception to the defense, See Model Penal Code § 3,02(b), Congress did not incorporate CAT article 2.2 into Section 2-4. Given that Congress omitted CAT's effort to bar a necessity or wartime defense, Section 2340 could be read as permitting the defense.

[22] (U) Early cases had suggested that in order to be eligible for defense of another, one should have some personal relationship with the one in need of protection. That view has been discarded. LaFave & Scott at 664.

(U) First, self-defense requires that the use of force be *necessary* to avoid the danger of unlawful bodily harm. *Id.* at 649. A defender may justifiably use deadly force if he reasonably believes that the other person is about to inflict unlawful death or serious bodily harm upon another, and that it is necessary to use such force to prevent it. *Id.* at 652. Looked at from the opposite perspective, the defender may not use force when the force would be as equally effective at a later time and the defender suffers no harm or risk by waiting. *See* Paul H.Robinson, 2 Criminal Law Defenses § 131(c) at 77 (1984). If, however, other options permit the defender to retreat safely from confrontation without having to resort to deadly force, the use of force may not be necessary in the first place. LaFave and Scott, at 659-60.

(U) Second, self-defense requires that the defendant's belief in the necessity of using force be reasonable. If a defendant honestly but unreasonably believed force was necessary, he will not be able to make out a successful claim of self-defense. *Id.* at 654. Conversely, if a defendant reasonably believed an attack was to occur, but the facts subsequently showed no attack was threatened, he may still raise self-defense. As LaFave and Scott explain, "one may be justified in shooting to death an adversary who, having threatened to kill him, reaches for his pocket as if for a gun, though it later appears that he had no gun and that he was only reaching for his handkerchief." *Id.* Some authorities such as the Model Penal Code, even eliminate the reasonability element, and require only that the defender honestly believed regardless of its reasonableness--that the use of force was necessary.

(U) Third, many legal authorities include the requirement that a defender must reasonably believe that the unlawful violence is "imminent" before he can use force in his defense. It would be a mistake, however, to equate imminence necessarily with timing--that an attack is immediately about to occur. Rather, as the Model Penal Code explains, what is essential is that the defensive *response* must be "immediately necessary." Model Penal Code § 3.04(1). Indeed, imminence must be merely another way of expressing the requirement of necessity. Robinson at 78. LaFave and Scott, for example, believe that the imminence requirement makes sense as part of a necessity defense because if an attack is not immediately upon the defender, the defender may have other options available to avoid the attack that do not involve the use of force. LaFave and Scott at 656. If, however, the fact of the attack becomes certain and no other options remain the use of force may be justified. To use a well-known hypothetical, if A were to kidnap and confine B, and then tell B he would kill B one week later, B would be justified in using force in self-defense, even if the opportunity arose before the week had passed. *Id.* at 656; *see also* Robinson at § 131(c)(1) at 78. In this hypothetical, while the attack itself is not imminent, B's use of force becomes immediately necessary whenever he has an opportunity to save himself from A.

(U) Fourth, the amount of force should be proportional to the threat. As LaFave and Scott explain, "the amount of force which [the defender] may justifiably use must be reasonably related to the threatened harm which he seeks to avoid." LaFave and Scott at 651. Thus, one may not use deadly force in response to a threat that does not rise to death or serious bodily harm. If such harm may result however, deadly force is appropriate.

As the Model Penal Code § 3.04(2)(b) states, "[t]he use of deadly force is not justifiable unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat."

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~~(S//NF)~~ Under the current circumstances, a defendant accused of violating the criminal prohibitions described above could have, in certain circumstances, grounds to properly claim the defense of another. The threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens. Whether such a defense will be upheld depends on the specific context within which the interrogation decision is made. If an attack appears increasingly likely, but our intelligence services and Armed Forces cannot prevent it without the information from the interrogation of a specific individual, then the more likely it will appear that the conduct in question will be seen as necessary. If intelligence and other information support the conclusion that attack is increasingly certain, then the necessity for the interrogation will be reasonable. The increasing certainty of an attack will also satisfy the imminence requirement. Finally, the fact that previous al Qaida attacks have had as their aim the deaths of American citizens, and that evidence of other plots have had a similar goal in mind, would justify proportionality of interrogation methods designed to elicit information to prevent them.

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~~(S//NF)~~ To be sure, this situation is different from the usual self-defense justification, and indeed, it overlaps with elements of the necessity defense. Self-defense as usually discussed involves using force against an individual who is about to conduct the attack. In the current circumstances, however, an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack, rather he has participated in the planning and preparation for the attack, or merely has knowledge of the attack through his membership in the terrorist organization. Nonetheless, leading scholarly commentators believe that interrogation of such individuals using methods that might violate Section 2340A would be justified under the doctrine of self-defense, because the combatant by aiding and promoting the terrorist plot "has culpably caused the situation here someone might get hurt. If hurting him is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible." Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280, 323 (1989) (symposium on Israel's Landau Commission Report).[23] *See* also Alan M. Dershowitz, *Is It Necessary to Apply "Physical Pressure" to Terrorists—and to Lie About It?*, 23 Israel L. Rev. 192, 199-200 (1989). Thus, some commentators believe that by helping to create the threat of loss of life, terrorists become culpable for the threat even though they do not actually carry out the attack itself. If necessary, they may be hurt in an interrogation because they are part of the mechanism that has set the attack in motion, just as is someone who feeds ammunition or targeting information to an attacker. *Moore*, at 323.

[23] (U) Moore distinguishes that case from one in which a person has information that could stop a terrorist attack, but who does not take a hand in the terrorist activity itself, such as an innocent person who learns of the attack from her spouse. Moore, 23 Israel L. Rev. at 324. Such individuals, Moore finds, would not be subject to the use of force in self-defense, although they might under the doctrine of necessity.

(U) A claim by an individual of the defense of another would be further supported by the fact that in this case, the nation itself is under attack and has the right to self-defense. This fact can bolster and support an individual claim of self-defense in a prosecution, according to the Supreme Court in *In re Neagle*, 135 U.S. 1 (1890). In that case, the State of California arrested and held deputy U.S. Marshal Neagle for shooting and killing the assailant of Supreme Court Justice Field. In granting the writ of habeas corpus for Neagle's release, the Supreme Court did not rely alone upon the marshal's right to defend another or his right to self-defense. Rather, the Court found that Neagle, as an agent of the United States and of the executive branch, was justified in the killing because in protecting Justice Field, he was acting pursuant to the executive branch's inherent constitutional authority to protect the United States government. *Id.* at 67 ("We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death.") That authority derives, according to the Court, from the President's power under Article II to take care that the laws are faithfully executed. In other words, Neagle as a federal officer not only could raise self-defense or defense of another, but also could defend his actions on the ground that he was implementing the Executive Branch's authority to protect the United States government.

(U) If the right to defend the national government can be raised as a defense in an individual prosecution as *Neagle* suggests, then a government defendant, acting in his official capacity, should be able to argue that any conduct that arguably violated a criminal prohibition was undertaken pursuant to more than just individual self-defense or defense of another. In addition, the defendant could claim that he was fulfilling the Executive Branch's authority to protect the federal government, and the nation, from attack. The September 11 attacks have already triggered that authority, as recognized both under domestic and international law. Following the example of *In re Neagle*, we conclude that a government defendant may also argue that his conduct of an interrogation properly authorized, is justified on the basis of protecting the nation from attack.

(U) There can be little doubt that the nation's right to self-defense has been triggered under our law. The Constitution announces that one of its purposes is "to provide for the common defense." U.S. Const., Preamble. Article I, § 8 declares that Congress is to exercise its powers to "provide for the common defense." *See also* 2 Pub. Papers of Ronald Reagan 920, 921 1988-89) (right to self-defense recognized by Article 51 of the U.N. Charter). The President has particular responsibility and power to take steps to defend the nation and its people. *In re Neagle*, 135 U.S at 64. *See also* U.S. Const., art. IV, § 4 ("The United States shall. . .protect [each of the States] against Invasion"). As Commander-in-Chief and Chief Executive, he may use the Armed Forces to protect the nation and its people. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). And he may employ secret agents to aid in his work as Commander-in-Chief. *Totten v. United States*, 92 U.S. 105, 106 (1876). As the Supreme Court observed in *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), in response to an armed attack on the United States "the President is not only authorized but bound to resist force by force ...without waiting for any special legislative authority." *Id.* at 668. The September 11 events were a direct attack on the United States, and as we have explained

above, the President has authorized the use of military force with the support of Congress.[24]

(U) As DOJ has made clear in opinions involving the war on al Qaida, the nation's right to self-defense has been triggered by the events of September 11. If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaida terrorist network. In that case, DOJ believes that he could argue that the executive branch's constitutional authority to protect the nation from attack justified his actions. This national and international version of the right to self-defense could supplement and bolster the government defendant's individual right.

### d. Military Law Enforcement Actions

(U) Use of force in military law enforcement is authorized for (1) self-defense and defense of others against a hostile person when in imminent danger of death or serious bodily harm *by the hostile person*; (2) to prevent the actual theft or sabotage of assets vital to national security; (3) to prevent the actual theft or sabotage of resources that are inherently dangerous to others; (4) to prevent the commission of a serious crime that involves imminent danger of death or serious bodily harm; (5) to prevent the destruction of vital public utilities or similar critical infrastructure; (6) for apprehension; and (7) to prevent escape. (DODD 5210.56, 1 Nov 2001). These justifications contemplate the use of force against a person who has committed, is committing, or is about to commit, a serious offense. Although we are not aware of any authority that applies these concepts in the interrogation context, the justified use of force in military law enforcement may provide useful comparisons to the use of force against a detainee to extract intelligence for the specific purpose of preventing a serious and imminent terrorist incident.

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[24] (U) While the President's constitutional determination alone is sufficient to justify the nation's resort to self-defense, it also bears noting that the right to self-defense is further recognized under international law. Article 51 of the U.N. Charter declares that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security." The attacks of September 11, 2001, clearly constitute an armed attack against the United States, and indeed were the latest in a long history of al Qaida sponsored attacks against the United States. This conclusion was acknowledged by he United Nations Security Council on September 29, 2001, when it unanimously adopted Resolution 1373 explicitly "reaffirming the inherent right of individual and collective defense as recognized by the charter of the United Nations. This right of self-defense is a right to effective self-defense. In other words, the victim state has the right to use force against the aggressor who has initiated an "armed attack" until the threat has abated. The United States, through its military and intelligence personnel, has a right recognized by Article 51 to continue using force until such time as the threat posed by al Qaida and other terrorist groups connected to the September 11th attack is completely ended." Other treaties re-affirm the right of the United States to use force in its self-defense. See, e.g., Inter-American Treaty of Reciprocal Assistance, art. 3, Sept. 2, 1947, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (Rio Treaty); North Atlantic Treaty, art. 5, Apr. 4, 1949, 3 Stat. 2241, 34 U.N.T.S. 243.

### e. Superior Orders

(U) Under both international law and U.S. law, an order to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an *unlawful* order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict.[25] Only if the individual did not know of the unlawfulness of an order, and he could not reasonably be expected under the circumstances to recognize the order as unlawful, will the defense of obedience of a superior order protect a subordinate from the consequences of violation of the law of armed conflict.[26]

(U) Under international law, the fact that a war crime is committed pursuant to the orders of a military or civilian superior does not by itself relieve the subordinate committing it from criminal responsibility under international law.[27] It may, however, be considered in mitigation of punishment.[28]

(U) For instance, the Charter of the International Military Tribunal at Nuremberg, art. 8, stated:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.[29]

(U) Similarly, the Statute for the International Tribunal for Yugoslavia, and the Statute for the International Criminal Tribunal for Rwanda provide (in articles 7(4) & 6(4), respectively) provide:

> The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in anticipation of punishment if the Tribunal determines that justice so requires.

(U) As to the general attitude taken by military tribunals toward the plea of superior orders, the following statement is representative:

> It cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers

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[25] (U) *See* Section 6.1.4, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP 1-14M 1997)

[26] *Id*

[27] The International Criminal Court also takes this view. Article 33 of the Rome Statute, recognizes that: "1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

[28] *Id.*, at §6.2.5.5.1.

[29] *See* U.S. Naval War College, International Law Documents, at 1944-45, 255 (1946).

> is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the interior [*sic*] will be protected. But the general rule is the members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice.

*The Hostage Case* (*United States v. Wilhelm List et al.*), 11 TWC 1236.

(U) The International Military Tribunal at Nuremberg declared in its judgment that the test of responsibility for superior orders "is not the existence of the order, but whether moral choice was in fact possible."[30]

(U) Domestically, the UCMJ discusses the defense of superior order in The Manual Courts-Martial, which provides in R.C.M. 916(d), MCM 2002:

> It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful. An act performed pursuant to a lawful order is justified. An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

*Inference of lawfulness.* An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate.[31]

(U) In sum, the defense of superior orders will generally be available for U.S. Armed Forces personnel engaged in exceptional interrogations except where the conduct goes so far as to be patently unlawful.

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[30] (U) 1 Trial of Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945- 1 October 1946, at 224 (1947), *excerpted in* U.S. Naval War College, International Law Documents, 1946-1947, at 260 (1948).

[31] (U) This inference does not apply to a patently illegal order, such as one that directs the commission of a crime. (Article 90, UCMJ).

### 4. Lack of DOJ Representation for DOD Personnel Charged with a Criminal Offense

(U) DOJ representation of a defendant is generally not available in federal criminal proceedings, even when the defendant's actions occur within the scope of federal employment.[32]

## B. Federal Civil Statutes

### 1. 28 U.S.C. §1350

(U) 28 U.S.C. §1350 extends the jurisdiction of the U.S. District Courts to "*any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*"[33] Section 1350 is a vehicle by which victims of torture and other human rights violations by their native government and its agents have sought judicial remedy for the wrongs they've suffered. However, all the decided cases we have found involve foreign nationals suing in U.S. District Courts for conduct by foreign actors/governments.[34] The District Court for the District of Columbia has determined that Section 1350 actions, by the GTMO detainees, against the United States or its agents acting within the scope of employment fail. This is because (1) the United States has not waived sovereign immunity to such suits like those brought by the detainees, and (2) the *Eisentrager* doctrine barring habeas access also precludes other potential avenues of jurisdiction.[35] This of course leaves interrogators vulnerable in their individual capacity for conduct a court might find to constitute torture. Assuming a court would take jurisdiction over the matter and grant standing to the detainee[36], it is possible that this statute would provide an avenue of relief for actions of the United States or its agents found to violate customary international law. The Department of Justice has argued that Section 1350 does not provide a cause of action and is merely jurisdictional in nature. The Department of Justice is currently studying whether to participate in ongoing Section 1350 litigation.

### 2. Torture Victims Protection Act (TVPA)

(U) In 1992, President Bush signed into law the Torture Victims Protection Act of 1991.[37] Appended to the U.S. Code as a note to section 1350, the TVPA specifically creates a cause of action for individuals (or their successors) who have been subjected to

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[32] (U) 28 CFR § 50.15 (a)(4)

[33] (U) 28 U.S.C. §1350, the Alien Tort Claim Act (ATCA).

[34] (U) See, for example, *Abebe-Jira v. Negewo*, No. 93-9133, United States Court of Appeals, Eleventh Circuit, Jan 10, 1996. In this case the 11th Circuit concluded, "the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law."

[35] (U) *Al Odah v. United States*, (D.D.C., 2002)

[36] (U) *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980) 885, note 18, "conduct of the type alleged here [torture] would be actionable under 42 U.S.C. § 1983, or undoubtedly the Constitution, if performed by a government official."

[37] (U) Pub. L. No. 102-256, 106 Stat. 73, 28 U.S.C § 1350 (note).

torture or extra-judicial killing by "an individual who, under actual or apparent authority, or color of law, *of any foreign nation* - (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extra-judicial killing shall, in a civil action, be liable for damages ...." (emphasis added)[38] Thus, the TVPA does not apply to the conduct of U.S. agents acting under the color of law.

## C. Applicability of the United States Constitution

### 1. Applicability of the Constitution to Aliens Outside the United States

(U) Nonresident enemy aliens do not enjoy constitutional rights outside the sovereign territory of the United States.[39] The courts have held that unlawful combatants do not gain constitutional rights upon transfer to GTMO as unlawful combatants merely because the U.S. exercises extensive dominion and control over GTMO.[40] Moreover, because the courts have rejected the concept of "de facto sovereignty," constitutional rights apply to aliens only on sovereign U.S. territory. (See discussion under "Jurisdiction of Federal Courts", *infra*.)

(U) Although U.S. constitutional rights do not apply to aliens at GTMO, the U.S. criminal laws do apply to acts committed there by virtue of GTMO's status as within the special maritime and territorial jurisdiction.

### 2. The Constitution Defining U.S. Obligations Under International Law

(U) In the course of taking reservations to the Convention Against Torture and Other Cruel, and Inhuman or Degrading Treatment or Punishment, the United States determined that the Convention's prohibitions against cruel, inhuman or degrading treatment or punishment applied only to the extent that such conduct was prohibited by the Fifth, Eighth and Fourteenth Amendments to our Constitution.[41] Consequently, analysis of these amendments is significant in determining the extent to which the United

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[38] (U) The definition of torture used in PL 102-256 is: "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to lawful sanctions) whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind." This definition is substantially similar (with no meaningful difference) to the definition in the Torture Statute. The definition of mental pain and suffering is the same as in the Torture Statute.

[39] (U) *Eisentrager* at 764.

[40] (U) *Al Odah v. United States*, (D.D.C., 2002).

[41] (U) Articles of ratification, 21 Oct 1994: "I. The Senate's advice and consent is subject to the following reservations: (1) That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman, or degrading treatment or punishment', only insofar as the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Available at the UN documents site: http://193.194.138.190/html/menu3/treaty12_asp.htm.

States is bound by the Convention. It should be clear, however, that aliens held at GTMO do not have constitutional rights under the 5th Amendment's Due Process clause or the 8th Amendment. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950); *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

**a. Eighth Amendment**

(U) "An examination of the history of the Amendment and the decisions of this [Supreme] Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes."[42] The import of this holding is that, assuming a court would mistakenly hold that it had jurisdiction to hear a detainee's claim, the claim would not lie under the 8th Amendment. Accordingly, detainees could not pursue a claim regarding their pre-conviction treatment under the Eight Amendment.

(U) The standards of the Eighth Amendment are relevant, however, due to the U.S. Reservation to the Torture Convention's definition of cruel, inhuman, and degrading treatment. Under "cruel and unusual punishment" jurisprudence, there are two lines of analysis that are relevant to the conduct of interrogations: (1) conditions of confinement, and (2) excessive force. As a general matter, the excessive force analysis applies to the official use of physical force, often in situations in which an inmate has attacked another inmate or a guard whereas the conditions of confinement analysis applies to such things as administrative segregation. Under the excessive force analysis, "a prisoner alleging excessive force must demonstrate that the defendant acted 'maliciously and sadistically'" for the very purpose of causing harm. *Porter* v. *Nussle*, 534 U.S. 516, 528 (2002) (quoting *Hudson* v. *McMillan*, 503 U.S.1, at 7). Excessive force requires the unnecessary and wanton infliction of pain. *Whitney v. Albers*, 475 U.S. 312, 319 (1986).

(U) A condition of confinement is not "cruel and unusual" unless it (1) is "sufficiently serious" to implicate constitutional protection, *id.* at 347, and (2) reflects "deliberate indifference" to the prisoner's health or safety, *Farmer v. Brennan* 511 U.S. 825, 834 (1994). The first element is objective, and inquires whether the challenged condition is cruel and unusual. The second, so-called "subjective" element requires examination of the actor's intent and inquires whether the challenged condition is imposed as punishment. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.").

(U) The Supreme Court has noted that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the

[42] (U) *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). In *Ingraham*, a case about corporal punishment in a public junior high school, the Court analyzed the claim under the 14th amendment's Due Process clause, concluding that the conduct did not violate the 14th amendment, even though it involved up to 10 whacks with a wooden paddle.

progress of a maturing society." *Rhodes*, 452 U.S. at 146 (citation omitted). *See also Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (stating that the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency"). Nevertheless, certain guidelines emerge from the Supreme Court's jurisprudence.

(U) The Court has established that "only those deprivations denying 'the minimal civilized measures of life's necessities' sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson*, 501 U.S. at 298, *quoting Rhodes*, 452 U.S. at 347. It is not enough *for* a prisoner to show that he has been subjected to conditions that are merely "restrictive and even harsh," as such conditions are simply "part of the penalty that criminal offenders pay *for* their offenses against society." *Rhodes*, 452 U.S. at 347. *See also Wilson* at 349 ("the Constitution does not mandate comfortable prisons"). Rather, a prisoner must show that he has suffered a "serious deprivation of basic human needs," *id.* at 347, such as "essential food, medical care, or sanitation," *Id.* at 348. *See also Wilson*, 501 U.S. at 304 (requiring "the deprivation of a single, identifiable human need such as food, warmth, or exercise"). "The Amendment also imposes [the duty on officials to] provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates." *Farmer*, 511 U.S. at 832 (citations omitted). The Court has also articulated an alternative test inquiring whether an inmate was exposed to "a substantial risk or serious harm." *Id.* at 837. *See also DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001) ("In order to satisfy the [objective] requirement, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.").

(U) The various conditions of confinement are not to be assessed under a totality of the circumstances approach. In *Wilson* v. *Seiter*, 501 U.S. 294 (1991), the Supreme Court expressly rejected the contention that "each condition must be considered as part of the overall conditions challenged." *Id.* at 304 (internal quotation marks and citation omitted). Instead the Court concluded that "Some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single identifiable human need such as food, warmth, or exercise--for example, a low cell temperature at night combined with a failure to issue blankets." *Id.* at 304. As the Court further explained, "Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.* at 305.

(U) To demonstrate deliberate indifference, a prisoner must demonstrate "that the official was subjectively aware of that risk." *Farmer* v. *Brennan* 511 U.S. 125 (1994). As the Supreme Court further explained:

> We hold... that a prison official cannot be found liable under the Eighth Amendment for denying any inmate humane conditions of confinement unless the official knows of and regards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference can be drawn that a substantial risk of serious harm exists and he must also draw the inference.

*Farmer* v. *Brennan* 511 U.S. 825, 837 (1994). This standard requires greater culpability than mere negligence. *See Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994); *Wilson v. Seiter*, 501 U.S. 294, 302 (1991) ("mere negligence would satisfy neither [the *Whitley* standard of malicious and sadistic infliction] nor the more lenient deliberate indifference standard") (internal quotation marks omitted).

(U) The second line of cases considers the use of force against prisoners. The situation often arises in cases addressing the use of force while quelling prison disturbances. In cases involving the excessive use of force the central question is whether the force was applied in good faith in an attempt to maintain or restore discipline or maliciously and sadistically with the very purpose of causing harm.[43] Malicious and sadistic use of force always violates contemporary standards of decency and would constitute cruel and unusual punishment.[44] The courts apply a subjective test when examining intent of the official. In determining whether a correctional officer has used excessive force in violation of the Eighth Amendment, courts look to several factors including: (1) "the need for the application of force"; (2) "the relationship between the need and the amount of force that was used"; (3) "the extent of injury inflicted"; (4) "the extent of the threat to the safety of staff and inmates, as reasonably perceived by responsible officials on the basis of the facts known to them"; and (5) "any efforts made to temper the severity of a forceful response."[45] Great deference is given to the prison official in the carrying out of his duties.[46]

(U) One of the Supreme Court's most recent opinions on conditions of confinement – *Hope v. Pelzer*, 122 S.Ct. 2508 (2002) – illustrates the Court's focus on the necessity of the actions undertaken in response to a disturbance in determining the officer's subjective state of mind.[47] In *Hope*, following an "exchange of vulgar remarks" between the inmate Hope and an officer, the two got into a "wrestling match." *Id.* at 2512. Additional officers intervened and restrained Hope. *See id.* These officers then took Hope back to prison. Once there, they required him to take off his shirt and then attached him to the hitching post, where he remained in the sun for the next seven hours. See *id.* at 2512-13. During this time, Hope received no bathroom breaks. He was given water only once or twice and at least one guard taunted him about being thirsty. See *id.* at 2513. The Supreme Court concluded that the facts Hope alleged stated an "obvious" Eighth Amendment violation. *Id* at 2514. The obviousness of this violation stemmed from the utter lack of necessity for the actions the guards undertook. The Court emphasized that "any safety concerns" arising from the scuffle between Hope and the officer "had long since abated by the time [Hope] was attached to the hitching post" and

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[43] (U) Actions taken in "good-faith. . .to maintain or restore discipline" do not constitute excessive force. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)

[44] (U) *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)

[45] (U) *Whitley* at 321.

[46] (U) *Whitley v. Albers*, 475 U.S. (1986).

[47] (U) Although the officers' actions in Hope were undertaken in response to a scuffle between an inmate and a guard, the case is more properly thought of a "conditions of confinement" case rather than an "excessive force" case. By examining the officers' actions through the "deliberate indifference standard" the Court analyzed it as a "conditions of confinement" case. The deliberate indifference standard is inapplicable to claims of excessive force.

that there was a "clear lack of an emergency situation." *Id.* As a result, the Court found that "[t]his punitive treatment amount[ed] to [the] gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits." *Id.* at 2515. Thus, the necessity of the governmental action bears upon both the conditions of confinement analysis as well as the excessive force analysis.

(U) In determining whether the government's actions are "wanton and unnecessary," consideration must be given to the government's legitimate interests. In the context of the war on terrorism and the collection of intelligence from detainees regarding future attacks, the legitimate government interest is of the highest magnitude. In the typical conditions of confinement case, the protection of other inmates or officers, the protection of the inmate alleged to have suffered the cruel and unusual punishment, or even the maintenance of order in the prison, provide valid government interests for various deprivations. *See, e.g., Anderson v. Nosser,* 438 F.2d 183, 193 (5th Cir. 1971) ("protect[ing] inmates from self-inflicted injury, protect[ing] the general prison population and personnel from violate acts on his part, [and] prevent[ing] escape" are all legitimate penological interests that would permit the imposition of solitary confinement); *McMahon* v. *Beard,* 583 F.2d 172, 175 (5th Cir. 1978) (prevention of inmate suicide is a legitimate interest). As with excessive force, no court has encountered the precise circumstances here under conditions of confinement jurisprudence. Nonetheless, there can be no more compelling government interest than that which is presented here and, depending upon the precise factual circumstances of an interrogation, e.g., where there is credible information that the detainee had information that could avert a threat, deprivations that may be caused would not be wanton or unnecessary.

### b. Fifth Amendment and Fourteenth Amendment[48]

(U) All persons within the territory of the United States are entitled to the protections of Due Process as provided by the 5th and 14th Amendments, including corporations, aliens, and presumptively citizens seeking readmission to the United States. However, the Due Process Clause does not apply to enemy alien belligerents engaged in hostilities against the United States and/or tried by military tribunals outside the territorial jurisdiction of the United States.[49] The *Eisentrager* doctrine works to prevent access by enemy belligerents, captured and held abroad, to U.S. courts. Further, in *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990), the Supreme Court held that aliens outside the United States did not have Fourth Amendment rights against the U.S. government. Indeed, in that case, the Court observed that extension of constitutional rights to aliens outside of the United States would interfere with the military operations against the nation's enemies.

(U) In the detainee context, the standards of the Due Process Clauses are relevant due to the U.S. Reservation to the Torture Convention's definition of cruel, inhuman, and

[48] (U) Because the Due Process considerations under the 5th and 14th amendments are the same for our purposes, this analysis considers them together.

[49] (U) *Johnson v. Eisentrager,* 339 U.S. 763 (1950); *In re Yamashita,* 327 U.S. 1 (1946).

degrading treatment, which the United States has defined to mean conduct prohibited under the Due Process Clause of the 5th and 14th Amendments (in addition to the standards under the 8th Amendment discussed above). The Due Process jurisprudence is divided into two distinct categories—procedural due process and substantive due process. Procedural due process is manifest in issues pertaining to the provision of adequate administrative and/or judicial process, including notice and an opportunity to be heard. Substantive due process involves questions of force being excessive in light of the government interest being addressed. In the detainee context, the limits of substantive due process define the scope of permissible interrogation techniques that may be applied to unlawful combatants held outside the United States.

(U) Under the Fifth Amendment right to Due Process, substantive due process protects an individual from "the exercise of power without any reasonable justification in the service of any legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Under substantive due process "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id* at 846 (internal quotation marks omitted). That conduct must "shock[] the conscience." *See generally id; Rochin v. California*, 342 U.S. 165 (1952).[50] By contrast to deprivations in procedural due process, which cannot occur so long as the government affords adequate processes, government actions that "shock the conscience" are prohibited irrespective of the procedures the government may employ in undertaking those actions. *See generally Rochin v. California*, 342 U.S. 164 (1952).

(U) To shock the conscience, the conduct at issue must involve more than mere negligence by the government official. *See County of Sacramento*, 523 U.S. at 849. *See also Daniel v. Williams*, 474 U.S. 327 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.") (collecting cases). Instead, "[I]t is...behavior on the other end of the culpability spectrum that would most probably support a substantive due process claim: conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *See County of Sacramento*, 523 U.S. at 849. In some circumstances, however, recklessness or gross negligence may suffice. *See id.* The requisite level of culpability is ultimately "not. . .subject to mechanical application in unfamiliar territory." *Id.* at 850. As the Court explained: "Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Id.* As a general

[50] (U) In the seminal case of *Rochin v California*, 342 U.S. 165 (1952), the police had some information that the defendant was selling drugs. Three officers went to and entered the defendant's home without a warrant and forced open the door to defendant's bedroom. Upon opening the door, the officers saw two pills and asked the defendant about them. The defendant promptly put them in his mouth. The officers "jumped upon him and attempted to extract the capsules." *Id.* at 166. The police tried to pull the pills out of his mouth but despite considerable struggle the defendant swallowed them. The police then took the defendant to a hospital where a doctor forced an emetic solution into the defendant's stomach by sticking a tube down his throat and into his stomach, which cause the defendant to vomit up the pills. The pills did in fact contain morphine. *See id.* The Court found that the actions of the police officers "shocked the conscience" and therefore violated Rochin's due process rights. *Id* at 170.

matter, deliberate indifference would be an appropriate standard where there is a real possibility for actual deliberation. In other circumstances, however, where quick decisions must be made (such as responding to a prison riot), a heightened level of culpability is more appropriate. *See id.* at 851- 52.

(U) The shock-the-conscience standard appears to be an evolving one as the Court's most recent opinion regarding this standard emphasized that the conscience shocked was the "*contemporary* conscience." *Id.* at 847 n.8 (emphasis added). The court explained that while a judgment of what shocks the conscience "may be informed by a history of liberty protection, [] it necessarily reflects a traditional understanding of executive behavior, of contemporary practice, and of the standards of blame generally applied to them." *Id.* Despite the evolving nature of the standard, the standard is objective rather than subjective. The Supreme Court has cautioned that although "the gloss has ... has not been fixed" as to what substantive due process is, judges "may not drawn on [their] merely personal and private notions and disregard the limits that bind judges in their judicial function... [T]hese limits are derived from considerations that are fused in the whole nature of our judicial process." *Rochin*, 342 U.S. at 170. *See also, United States v. Lovasco*, 431 U.S. 783 (1973) (reaffirming that the test is objective rather than subjective). As the Court further explained, the conduct at issue must "do more than offend some fastidious squeamishness or private sentimentalism' in order to violate due process. *Rochin*, 342 U.S. at 172.

(U) The Supreme Court also clarified in *Ingraham v. Wright*, 430 U.S. 651 (1977), that under substantive due process, "[t]there is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Id.* at 674. And as Fourth Circuit has noted, it is a "principle...inherent in the Eighth [Amendment] and [substantive due process" that "[n]ot ...every malevolent touch by a prison guard gives rise to a federal cause of action. *See Johnson v. Glick*, 481 F.2d at 1033 ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights")." *Riley v. Dorton*, 115 F.3d 1159, 1167 (4th Cir. 1997) (quoting *Hudson*, 503 U.S. at 9). Instead, "the [shock-the-conscience]... inquiry....[is] whether the force applied caused injury so severe, and was so disproportionate to the need presented and so inspired by malice or sadism...that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987). Examples of physical brutality that "shock the conscience" include: the rape of a plaintiff by uniformed officer, see *Jones v. Wellham*, 104 F.3d 620 (4th Cir. 1997); a police officer striking a plaintiff in retaliation for the plaintiff photographing the police officer, see *Shillinford v. Holmes*, 634 F.2d 263 (5th Cir. 1981); police officer shot a fleeing suspect's legs without any probable cause other than the suspect's running and failing to stop, see *Aldridge v. Mullins*, 377 F. Supp. 850 (M.D. Tenn. 1972) *aff'd*, 474 1189 (6th Cir. 1973). Moreover, beating or sufficiently threatening someone during the course of an interrogation can constitute conscience-shocking behavior. See *Gray v. Spillman*, 925 F.2d 90, 91 (4th Cir. 1991) (plaintiff was beaten and threatened with further beating if he did not confess). By contrast, for example, actions such as verbal insults and an angry slap of "medium force" did not constitute behavior that "shocked the conscience." *See*

*Riley v. Dorton*, 115 F.3d 1159, 1168 n.4 (4th Cir. 1997) (finding claims that such behavior shocked the conscience "meritless").

(U) Physical brutality is not the only conduct that may meet the shock-the-conscience standard. In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc), the Ninth Circuit held that certain psychologically-coercive interrogation techniques could constitute a violation of substantive due process. The interrogators techniques were "designed to instill stress, hopelessness, and fear, and to break [the suspect's] resistance." *Id.* at 1229. The officers planned to ignore any request for a lawyer and to ignore the suspect's right to remain silent, with the express purpose that any statements he might offer would help keep him from testifying in his own defense. *See id.* at 1249. It was this express purpose that the court found to be the "aggravating factor" that lead it to conclude that the conduct of the police "shocked the conscience." *Id.* at 1249. The court reasoned that while "it is a legitimate purpose of police investigation to gather evidence and muster information that will surround a guilty defendant and make it difficult if not impossible for him to escape justice[,]" "when the methods chosen to gather evidence and information are deliberately unlawful and flout the Constitution, the legitimacy is lost." *Id.* at 1250. In *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), the Seventh Circuit found that severe mental distress inflicted on a suspect could be a basis for a substantive due process claim. *See id.* at 195. *See also Rhrodes v. Robinson*, 612 F.2d 766, 771 (3d Cir. 1979) (claim of emotional harm could be the basis of a substantive due process claim). The *Wilkins* court found that under certain circumstances interrogating a suspect with gun at his head could violate those rights. *See* 872 F.2d at 195. Whether it would rise to the level of violation depended upon whether the plaintiff was able to show "misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience, and that it is calculated to induce not merely momentary fear or anxiety, but severe mental suffering, in the plaintiff." *Id.* On the other hand, we note that merely deceiving the suspect does not shock the conscience, see, e.g., *United States v. Byram*, 145 F.3d 405 (1st Cir. 1998) (assuring defendant he was not in danger of prosecution did not shock the conscience) nor does the use of sympathy or friends as intermediaries, see, e.g., *United States v. Simtob*, 901 F.2d 799, 809 (9th Cir. 1990).

(U) Although substantive due process jurisprudence is not necessarily uniform in all applications, several principles emerge. First, whether conduct is conscience-shocking turns in part on whether it is without any justification, i.e., it is "inspired by malice or sadism." *Webb*, 828 F .2d at 1158. Although unlawful combatants may not pose a threat to others in the classic sense seen in substantive due process cases, the detainees here may be able to prevent great physical injury to countless others through their knowledge of future attacks. By contrast, if the interrogation methods were undertaken solely to produce severe mental suffering, they might shock the conscience. Second, the official must have acted with more than mere negligence. Because, generally speaking, there will be time for deliberation as to the methods of interrogation that will be employed, it is likely that the culpability requirement here is deliberate indifference. *See County of Sacramento*, 523 U.S. at 851-52. Thus, an official must know of a serious risk to the health or safety of a detainee and he must act in conscious disregard for that risk in order to violate due process standards. Third, this standard permits some physical

contact. Employing a shove or slap as part of an interrogation would not run afoul of this standard. Fourth, the detainee must sustain some sort of injury as a result of the conduct, e.g., physical injury or severe mental distress, in order for the constraints of substantive due process to be applicable.

## D. Jurisdiction of Federal Courts

### 1. Jurisdiction to Consider Constitutional Claims

(U) The federal habeas statute provides that courts may only grant the writ "within their respective jurisdictions." This has been interpreted to limit a court's subject matter jurisdiction over habeas cases to those in which a custodian lies within the jurisdiction. For U.S. citizens, habeas jurisdiction lies regardless of where the detention occurs. The habeas action must be brought in the district in which a custodian resides or, if all custodians are outside the United States, in the District of Columbia. For aliens, there is no habeas jurisdiction outside the sovereign territory of the United States.[51]

(U) As construed by the courts, habeas jurisdiction is coterminous with the reach of constitutional rights, although that result is a matter of statutory construction. Congress has the power to extend habeas jurisdiction beyond the reach of constitutional rights but may not place greater restrictions on it.

(U) In *Johnson v. Eisentrager*, the Supreme Court ruled that enemy aliens, captured on the field of battle abroad by the U.S. Armed Forces, tried abroad for war crimes, and incarcerated abroad do not have access to the U.S. courts[52] over a habeas petition filed by German nationals seized by U.S. soldiers in China. *Eisentrager* considered habeas corpus petitions by German soldiers captured during WWII in China supporting the Japanese, convicted by Military Commission sitting in China, and incarcerated in Germany and concluded that United States courts lacked jurisdiction.[53]

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[51] (U) *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[52] (U) *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950). "We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." With those words, the Supreme Court held that: "a nonresident enemy alien has no access to our courts in wartime."

[53] (U) For a fuller discussion of Habeas Corpus law as it applies to Naval Base, Guantanamo Bay, *see* memorandum, LCDR F. Greg Bowman of 29 Jan 02, subj: CRIMINAL JURISDICTION AND ITS EFFECTS OF AVAILABILITY OF THE WRIT OF HABEAS CORPUS AT U.S. NAVAL BASE, GUANTANAMO BAY, CUBA (on file).

(U) Recently, unlawful combatants detained at Guantanamo Bay, Cuba (GTMO) have sought review in U.S. district court through the writ of habeas corpus, 28 U.S.C. § 2241.[54]

(U) Two courts have examined, and rejected, petitioners' claims that U.S. exclusive jurisdiction over GTMO results in a form of "de facto sovereignty" and, therefore, vests habeas jurisdiction in the federal courts.

### 2. Other Bases for Federal Jurisdiction

(U) In addition, one group of GTMO detainees has challenged conditions of confinement through the Alien Tort Claims Act (ATCA) and the Administrative Procedures Act (APA). The courts have declined to exercise jurisdiction on those theories in each case to date. Petitioners in *Al Odah* attempted to circumvent the territorial limitations of habeas by bringing their action under the APA and ATCA, however the U.S. Court of Appeals for the District of Columbia held that the courts did not have jurisdiction with respect to the petitioners' claims under any theory, finding that their status as aliens unconnected to the United States makes them beyond the jurisdiction of the federal courts. *See Odah v. United States*, 321 F.3rd 1134 (DC Cir. 2003).[55]

(U) The court also held, in the alternative, that it lacked jurisdiction even if petitioners were not barred by the exclusive nature of habeas actions. The ATCA provides the "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 18 U.S.C. § 1350. The ATCA, although it provides federal jurisdiction over private suits, does not waive sovereign immunity for a suit against the United States. The courts have held that the APA's waiver of sovereign immunity for nonmonetary damages can theoretically be used to maintain an ATCA action against the United States. The *Al Odah* Court, however, found that the APA's exemption for "military authority exercised in the field in time of war or in occupied territory" precluded the ATCA.

### 3. The Military Extraterritorial Jurisdiction Act

(U) The Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261 *et seq*, extends Federal criminal jurisdiction for serious Federal offenses committed outside the United States to civilian persons accompanying the Armed Forces (e.g., civilian employees and contractor employees), and to members of the Armed Forces who committed a criminal act while subject to the UCMJ but who are no longer are subject to the UCMJ or who committed the offense with a defendant not subject to the UCMJ. The standard is that if the conduct by the individual would "constitute an offense punishable by imprisonment for more than one year *if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States*." (emphasis added).

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[54] (U) *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal.), affirmed in part and vacated in part, 310 F.3d 1153 (9th Cir. 2002); *Rasul v. Bush*, 215 F.2d 55 (D.D.C. 2002).

[55] (U) The concurring opinion in *Odah* argued that, in addition to not providing a means of jurisdiction, the ACTA also did not provide an independent cause of action.

## E. The Uniform Code of Military Justice

(U) The Uniform Code of Military Justice (UCMJ) applies to United States Forces on active duty, at all times and in all places throughout the world. Members of the Reserve component and retired regular officers can, under certain circumstances, also be subject to the UCMJ, as can civilians accompanying the Armed Forces in time of war under certain circumstances.[56]

### 1. Offenses

(U) A number of UCMJ provisions potentially apply to service members involved in the interrogation and supervision of the interrogation of detainees. Most significant are the following:[57]

#### a. Cruelty, Oppression or Maltreatment, Art 93

(U) The elements of the offense are that the alleged victim was subject to the orders of the accused and that the accused was cruel toward, oppressed, or maltreated the victim. The cruelty, etc. need not be physical. Subject to the orders of, includes persons, subject to the UCMJ or not, who are by some reason of some duty are required to obey the lawful orders of the accused, even if not in the direct chain of command of the accused. "Cruel," "oppressed," and "maltreated" refer to unwarranted, harmful, abusive, rough or other unjustifiable treatment that, under all the circumstances, results in physical or mental pain or suffering and is unwarranted, unjustified and unnecessary for any lawful purpose. It is measured by an objective standard. MCM IV-25; MJB, Section 3-17-1.

#### b. Reckless Endangerment, Art 134

(U) The elements of the offense are that the accused engaged in wrongful conduct that was reckless or wanton and that the conduct was likely to produce death or grievous bodily harm. "[L]ikely to produce" means the natural or probable consequences of particular conduct. "[G]rievous bodily harm" includes injuries comparable to fractured or dislocated bones, serious damage to internal organs. MCM IV-119; MJB, Section 3-100A-1.

#### c. Assault, Art 128

(U) This article encompasses the following offenses:

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[56] (U) Article 2 UCMJ; Rules for Courts-Martial, Rule 202, and Discussion.

[57] (U) The following are extracted from the Department of the Army Pamphlet 27-9, Military Judges' Benchbook (MJB), which summarizes the requirements of the Manual For Courts-Martial (MCM) and case law applicable to trials by courts martial.

*(U) Simple assault* – The elements are that the accused attempted or offered to do bodily harm to an individual and that such attempt or offer was done with unlawful force and violence. An act of force or violence is unlawful if done without legal justification or excuse and without the consent of the victim. The use of threatening words accompanied by a menacing act or gesture may constitute an assault. MCM IV-81; MJB, Section 3-54-1.

*(U) Assault consummated by a battery* – An assault resulting in actual infliction of bodily harm is a battery. Bodily harm means any physical injury to or offensive touching, however slight. MCM IV-83; MJB, Section 3-54-1A

*(U) Aggravated assault (use of a dangerous weapon, means or force)* – In addition to the elements of an assault, this offense requires that the means or force attempted or offered was used in a manner likely to produce death or grievous bodily harm. Any object, regardless of its normal use, could become a means likely to inflict grievous bodily harm depending on the manner in which it is actually used. MCM IV-84; MJB, Section 3-54-8

(U) There are multiple instances in which authority and context permit touching – by police officers, prison guards, training NCOs, etc. – that would not be lawful under other circumstances. A central issue would be how clearly the limits of authority were defined and whether under the circumstances the individual exceeded the scope of that authority.

**d. Involuntary Manslaughter, Art 119**

(U) The elements of this offense are that acts or omissions constituting culpable negligence resulted in an unlawful killing. Culpable negligence contemplates a level of heedlessness in circumstances in which, when viewed in the light of human experience, might foreseeably result in death. MCM IV-64. Failure to develop and follow reasonable protocols providing for the health and safety of detainees during interrogations of detainees could amount to such culpable negligence. MJB, Section 3-44-2.

**e. Unpremeditated Murder, Art 118**

(U) The relevant elements of the offense are that the person is dead, his death resulted from the act or failure to act of the accused, that the killing was unlawful, without legal justification, and at that time the accused had the intent to inflict great bodily harm upon the person. MCM IV-118, MJB, Section 3-43-2.

**f. Disobedience of Orders, Art 92**

(U) This offense is committed when the accused, having a duty to do so, fails to obey lawful orders or regulations. MCM IV-23; MJB, Section 3-16. The duty to obey may extend to treaties and statutes as well as regulations. The Convention against

Torture and the general case law regarding cruel and unusual punishment may be relevant here as it is for Article 93. *See generally, Wilson v. Seiter*, 501 U.S. 294 (1991).

**g. Dereliction of Duty, Art 92**

(U) A dereliction occurs when an individual knew or should have known of certain prescribed duties and either willfully or through neglect was derelict in the performance of those duties. MCM IV-24; MJB, Section 3-16-4. Customs of the service as well as statutes and treaties that have become the law of the land may create duties for purposes of this article.

**h. Maiming, Art 124**

(U) The elements of this offense are that the accused intentionally inflicted an injury on a person, and whether intended or not, that the injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor. MCM IV-77; MJB, Section 3-50-1.

**2. Affirmative Defenses under the UCMJ (R.C.M. 916)**

(U) In order for any use of force to be lawful, it must either be justified under the circumstances or an accepted affirmative defense is present to excuse the otherwise unlawful conduct. No case law was found that defines at what point force or violence becomes either lawful or unlawful during war. Each case is by its nature, dependent upon the factual circumstances surrounding the incident.

(U) Applying accepted rules for the law of armed conflict, the use of force is only authorized when there is a military purpose and the force used is no greater than necessary to achieve the objective. The existence of war does not in and of itself justify all forms of assault. For instance, in *United States v. Calley*, 22 U.S.C.M.A. 534, 48 C.M.R.19 (1973), the court recognized that "while it is lawful to kill an enemy in the heat and exercise of war, to kill such an enemy after he has laid down his arms . . . is murder." Further, the fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment. The thrust of these holdings is that even in war, limits to the use and extent of force apply.

**a. Self-Defense**

(U) For the right of self-defense to exist, the accused must have had a reasonable apprehension that death or grievous bodily harm was about to be inflicted on himself. The test is whether, under the same facts and circumstances, an ordinary prudent adult

person faced with the same situation would have believed that there were grounds to fear immediate death or serious bodily harm (an objective test) and the person must have actually believed that the amount of force used was required to protect against death or serious bodily harm (a subjective test). Grievous bodily harm means serious bodily injury. It does not mean minor injuries such as a black eye or a bloody nose, but does mean fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. MJB, Section 5-2. (See also the discussion of "Self-Defense" under the discussion of Federal law, *supra*.)

**b. Defense of Another**

(U) For this defense, the accused must have had a reasonable belief that harm was about to be inflicted and that the accused actually believed that force was necessary to protect that person. The accused must actually believe that the amount of force used was necessary to protect against the degree of harm threatened. MJB, Section 5-3-1.

**c. Accident**

(U) This defense arises when an accused is doing a lawful act in a lawful manner, free of any negligence, and unforeseeable or unintentional death or bodily harm occurs. MJB, Section 5-4.

**d. Mistake of Fact**

(U) If ignorance or mistake of a fact concerns an element of an offense involving specific intent, the ignorance or mistake need only exist in the mind of the accused, i.e., if the circumstances of an event were as the accused believed, there would be no offense. For crimes not involving specific intent, the ignorance or mistake must be both honest (actual) and reasonable. The majority of the crimes discussed above do not require specific intent. For instance, in the case of violations of general orders, knowledge is presumed. Most of the "mistakes" would likely be mistakes of law in that the accused would not believe that the conduct was unlawful. While mistakes of law are generally not a defense, unawareness of a law may be a defense to show the absence of a criminal state of mind when actual knowledge is not necessary to establish the offense. MJB, Section 5-11.

**e. Coercion or duress**

(U) It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. This apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply. R.C.M. 916(h), MJB, Section 5-5.

(U) To establish a duress defense it must be shown that an accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily harm if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply. The Court of Appeals stated in *United States v. Fleming*, 23 C.M.R. 7 (1957), that the defense of duress is available to an accused only if his commission of the crime charged resulted from reasonable fear of imminent death or grievous bodily harm to himself or his family. The risk of injury must continue throughout the criminal venture.

**f. Obedience to Orders (MJB, Sections 5-8-1 and 5-8-2)**

(U) The viability of obedience to orders as a defense turns on the directives and policy of the service member's Chain of Command. For example, when the interrogator at the direction of the command employs the use of physical force as an interrogation method, he/she would certainly raise the defense of obedience to orders. The question then becomes one of degree. While this may be a successful defense to simple assaults or batteries, it would unlikely be as successful to more serious charges such as maiming and manslaughter. Within the middle of the spectrum lay those offenses for which the effectiveness of this defense becomes less clear. Those offenses would include conduct unbecoming an officer, reckless endangerment, cruelty, and negligent homicide.

(U) Obedience to orders provides a viable defense only to the extent that the accused acted under orders, and did not know (nor would a person of ordinary sense have known), the orders were unlawful. Thus, the viability of this defense is keyed to the accused's (or a reasonable person's) knowledge of the lawfulness of the order. Common sense suggests that the more aggressive and physical the technique authorized (ordered) by the command, the more unlikely the reasonable belief that the order to employ such methods is lawful.

(U) In order for any use of force to be lawful, it must either (i) be justified under the circumstances or (ii) an accepted affirmative defense is present to excuse the otherwise unlawful conduct. No case law was found that defines at what point force or violence becomes either lawful or unlawful during war. Each case is by its nature, dependent upon the factual circumstances surrounding the incident.

(U) Applying accepted rules for the law of armed conflict, the use of force is only authorized when there is a military purpose and the force used is no greater than necessary to achieve the objective. The existence of war does not in and of itself justify all forms of assault. For instance, in *US v. Calley*, the court recognized that "while it is lawful to kill an enemy "in the heat and exercise of war, to kill such an enemy after he has laid down his arms . . . is murder." Further, the fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense

in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment." The thrust of these holdings is that even in war, limits to the use and extent of force apply.

**g. Necessity**

(U) Another common law affirmative defense is one of necessity. This defense is recognized by a number of states and is applicable when: 1) the harm must be committed under the pressure of physical or natural force, rather than human force; 2) the harm sought to be avoided is greater than (or at least equal to) that harm sought to be prevented by the law defining the offense charged; 3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid the greater harm; 4) the actor must be without fault in bringing about the situation; and 5) the harm threatened must be imminent, leaving no alternative by which to avoid the greater harm.

(U) However, military courts have treated the necessity defense with disfavor, and in fact, some have refused to accept necessity as a permissible defense (the MCM does not list necessity as an affirmative defense under RCM 916). "The problem with the necessity defense is that it involves a weighing of evil inflicted against evil avoided and is, thereby, difficult to legislate." The courts also have been reluctant to embrace the defense due to a "fear that private moral codes will be substituted for legislative determination, resulting in a necessity exception that swallows the rule of law." *United States v. Rankins*, 34 MJ 326 (CMA 1992).

(U) The effect of these cases is that the MCM recognizes that an accused may commit an illegal act in order to avoid the serious injury or death of the accused or an innocent person. However, military law limits this defense only when there is an imminent and continuing harm that requires immediate action to prevent. Once the immediacy is gone, the defense will no longer apply. Ostensibly, the use of force to acquire information from an unlawful combatant, absent immediate and compelling circumstances, will not meet the elements established by the MCM and case law. (But see the necessity defense in the discussion of Federal law, *supra*.)

**3. Legal doctrines could render specific conduct, otherwise criminal, *not* unlawful**

See discussion of Commander-in-Chief Authority, *supra*.

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# IV. Considerations Affecting Policy

## A. Historical Role of U.S. Armed Forces

### 1. Background

(U) The basic principles of interrogation doctrine, procedures, and techniques applicable to Army intelligence interrogations from June 1945 through May 1987 were contained in Field Manual (FM) 30-15, Examination of Personnel and Documents. FM 30-15 set forth Army doctrine pertaining to the basic principles of intelligence interrogations and established the procedures and techniques applicable to Army intelligence interrogations of non-U.S. personnel. The other Services report that they too apply the provisions of this Field Manual.

### 2. Interrogation Historical Overview

(U) FM 30-15 stated that the principles and techniques of interrogation discussed within the manual are to be used within the constraints established by humanitarian international law and the Uniform Code of Military Justice ("UCMJ"). The fundamental principle underlying Army doctrine concerning intelligence interrogations between 1945 and the issuance of current doctrine in 1987 (FM 34-52), is that the commander may utilize all available resources and lawful means in the accomplishment of his mission and for the protection and security of his unit. However, a strong caveat to this principle noted, "treaty commitments and policy of the United States, international agreements, international law, and the UCMJ require the conduct of military to conform with the law of war." FM 30-15 also recognized that Army intelligence interrogations must conform to the "specific prohibitions, limitations, and restrictions established by the Geneva Conventions of 12 August 1949 for the handling and treatment of personnel captured or detained by military forces" (citing FM 27-10, The Law of Land Warfare).

(U) FM 30-15 also stated that "violations of the customary and treaty law applicable to the conduct of war normally constitute a concurrent violation of the Uniform Code of Military Justice and will be prosecuted under that code." The manual advised Army personnel that it was "the direct responsibility of the Commander to insure that the law of war is respected in the conduct of warfare by forces in his command." Thus, the intelligence interrogation techniques outlined in FM 30-15 were based upon conduct sanctioned under international law and domestic U.S. law and as constrained within the UCMJ.

(U) Historically, the intelligence staff officer (G2/S2) was the primary Army staff officer responsible for all intelligence functions within the command structure. This responsibility included interrogation of enemy prisoners of war (EPW), civilian internees, and other captured or detained persons. In conducting interrogations, the intelligence staff officer was responsible for insuring that these activities were executed in accordance with international and domestic U.S. law, United States Government policy, and the applicable regulations and field manuals regarding the treatment and handling of EPWs,


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civilian internees, and other captured or detained persons. In the maintenance of interrogation collection, the intelligence staff officer was required to provide guidance and training to interrogators, assign collection requirements, promulgate regulations, directives, and field manuals regarding intelligence interrogation, and insure that interrogators were trained in international and domestic U.S. law and the applicable Army publications.

(U) FM 30-15 stated that intelligence interrogations are an art involving the questioning and examination of a source in order to obtain the maximum amount of usable information. Interrogations are of many types, such as the interview, a debriefing, and an elicitation. However, the FM made clear that the principles of objective, initiative, accuracy, prohibitions against the use of force, and security apply to all types of interrogations. The manual indicated that the goal is to collect usable and reliable information, in a lawful manner, promptly, while meeting the intelligence requirements of the command.

(U) FM 30-15 emphasized a prohibition on the use of force during interrogations. This prohibition included the actual use of force, mental torture, threats, and exposure to inhumane treatment of any kind. Interrogation doctrine, procedures, and techniques concerning the use of force are based upon prohibitions in international and domestic U.S. law. FM 30-15 stated that experience revealed that the use of force was unnecessary to gain cooperation and was a poor interrogation technique, given that its use produced unreliable information, damaged future interrogations, and induced those being interrogated to offer information viewed as expected in order to prevent the use of force. However, FM 30-15 stated that the prohibition on the use of force, mental or physical, must not be confused with the use of psychological tools and deception techniques designed to induce a source into providing intelligence information.

(U) The Center for Military History has been requested to conduct a search of government databases, to include the Investigative Records Repository, for documentation concerning the historical participation of the U.S. Armed Forces in interrogations and any archival materials related to interrogation techniques. As of the writing of this analysis, no reply has been received.

### 3. Current Doctrine

(U) In May 1987, the basic principles of current doctrine, procedures, and techniques applicable to Army intelligence interrogations were promulgated in Field Manual (FM) 34-52, Intelligence Interrogation. FM 34-52 provides general guidance for commanders, staff officers, and other personnel in the use of interrogation elements in Army intelligence units. It also outlines procedures for handling sources of interrogations, the exploitation and processing of documents, and the reporting of intelligence gained through interrogation. Finally, FM 34-52 covers directing and supervising interrogation operations, conflict scenarios, and their impact on interrogation operations, to include peacetime interrogation operations.

(U) Army interrogation doctrine today, and since 1945, places particular emphasis on the humane handling of captured personnel. Interrogators receive specific instruction by Army Judge Advocates on the requirements of international and domestic US law, to include constraints established by the Uniform Code of Military Justice (e.g. assault, cruelty and maltreatment, and communicating a threat).

(U) FM 34-52 adopted the principles and framework for conducting intelligence interrogations as stated in FM 30-15. FM 34-52 maintained the established Army doctrine that intelligence interrogations involved the art of questioning and examining a source in order to obtain the maximum amount of useable information. FM 34-52 also reiterated Army doctrine that the principles of objective, initiative, accuracy, prohibition on the use of force, and security apply to all types of interrogations. The goal of intelligence interrogation under current doctrine is the same, the collection of usable and reliable information promptly and in a lawful manner, while meeting the intelligence requirements of the command.

(U) FM 34-52 and the curriculum at U.S. Army Intelligence Center, Fort Huachuca, continue to emphasize a prohibition on the use of force. As stated in its predecessor, FM 34-52 defines the use of force to include actual force, mental torture, threats, and exposure to inhumane treatment of any kind. The underlying basis for this prohibition is the proscriptions contained in international and domestic U.S. law. Current Army intelligence interrogation doctrine continues to view the use of force as unnecessary to gain the cooperation of captured personnel. Army interrogation experts view the use of force as an inferior technique that yields information of questionable quality. The primary concerns, in addition to the effect on information quality, are the adverse effect on future interrogations and the behavioral change on those being interrogated (offering particular information to avoid the use of force). However, the Army's doctrinal prohibition on the use of force does not proscribe legitimate psychological tools and deception techniques.

(U) FM 34-52 outlines procedures and approach techniques for conducting Army interrogations. While the approach techniques are varied, there are three common purposes: establish and maintain control over the source and the interrogation, establish and maintain rapport between the interrogator and the source, and manipulate the source's emotions and weaknesses to gain willing cooperation. Approved techniques include: Direct, Incentive; Emotional (Love & Hate); Increased Fear Up (Harsh & Mild); Decreased Fear Down; Pride and Ego (Up & Down); Futility Technique; We Know All; Establish Your Identity; Repetition; File and Dossier; and Mutt and Jeff (Friend & Foe). These techniques are discussed at greater length in Section V, *infra*.

## B. Presidential and Secretary of Defense Directives

(U) The President's Military Order that addresses the detention, treatment, and trial of certain non-citizens in the war against terrorism,[58] provides, *inter alia*, that any

[58] (U) *Military Order - Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, President of the United States, November 13, 2001.

individual subject to the order be "treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria; afforded adequate food, drinking water, shelter, clothing, and medical treatment; and allowed the free exercise of religion consistent with the requirements of the detention."

(U) (S//NF) A Department of Defense memorandum[59] to the Chairman of the Joint Chiefs of Staff, with instructions to forward it to the Combatant Commanders, stated that "the United States has determined that Al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for the purposes of the Geneva Conventions of 1949." The memorandum further directed that "[t]he Combatant Commanders shall in detaining Al Qaida and Taliban individuals under the control of the Department of Defense treat them humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949."

(U) (G) The President has directed that "[a]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."[60]

## C. DOD-Specific Policy Considerations

(U) (The information in this section was derived from guidance provided by the Office of the Assistant Secretary of Defense (Special Operations and Low-Intensity Conflict)).

(U) (S//NF) The first priority of any detainee interrogation is to obtain intelligence on imminent or planned terrorist attacks against the United States and its citizens or interests. A clearly related priority is to obtain intelligence to enable the United States to conduct the ongoing war on terrorism effectively. Detainee interrogations have proven instrumental to United States efforts to uncover terrorist cells and thwart planned attacks.

(U) (S//NF) The Secretary of the Army (DoD lead for criminal investigations) will continue to assess, concurrently, the value of information on detainee activities for prosecution considerations. See *War Crimes and Related Investigations Within the US Central Command Area of Operations*, Secretary of Defense, January 19, 2002.

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[59] (U) (S//NF) Department of Defense Memorandum – Status of Taliban and Al Qaida, Secretary of Defense, January 19, 2002.

[60] (U) (C) White House Memorandum – Humane Treatment of al Qaida and Taliban Detainees, President of the United States, February 7, 2002.

(U) In the event of a request to shift the priority of interrogations from intelligence gathering to prosecution considerations, the following factors, among others, should be considered before such a request is approved:

- the nature of the impending threat to national security and to individuals;
- the imminence of the threat;
- the ability of the detainee to provide useful information to eliminate the threat; and
- potential benefit derived from an effective interrogation compared to the potential benefit from a better opportunity for effective prosecution.

(U) For routine interrogations, standard U.S. Armed Forces doctrine will be utilized.

(U) For interrogations involving exceptional techniques[61] approved by the Secretary of Defense, standard doctrine may be used as well as the specifically authorized exceptional techniques. However, such interrogations may be applied only in limited, designated settings approved by SECDEF or his designee, staffed by personnel specifically trained in their use and subject to a command/decision authority at a level specifically designated by the SECDEF for this purpose.

(U) Choice of interrogation techniques involves a risk benefit analysis in each case, bounded by the limits of DOD policy and U.S. law. When assessing whether to use exceptional interrogations techniques, consideration should be given to the possible adverse effects on U.S. Armed Forces culture and self-image, which at times in the past may have suffered due to perceived law of war violations. DOD policy, reflected in the DOD Law of War Program implemented in 1979 and in subsequent directives, greatly restored the culture and self-image of U.S. Armed Forces by establishing high benchmarks of compliance with the principles and spirit of the law of war, and thereby humane treatment of all persons in U.S. Armed Forces' custody.[62] In addition, consideration should be given to whether implementation of such exceptional techniques is likely to result in adverse effects on DOD personnel who become POWs, including possible perceptions by other nations that the United States is lowering standards related to the treatment of prisoners, generally.

(U) All interrogation techniques should be implemented deliberately following a documented strategy designed to gain the willing cooperation of the detainee using the least intrusive interrogation techniques and methods.

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[61] (U) In this context, an "exceptional" technique is one that is more aggressive than routine techniques and is designated an exceptional technique by the SECDEF, requiring special procedures and levels of approval for use.

[62] *See* DODD 5100.77 DoD Law of War Program, para 5.3.1 (9 Dec 98, canceling DODD 5100.77 of 10 Jul 79); DODD 2310.1 DoD Program for EPOW and Other Detainees, para 3.1 (18 Aug 94); CJCSI 5819.01B Implementation of the DoD LOW Program, para 4a (25 Mar 02).

(U) All interrogations involving exceptional methods approved by the appropriate authority must be applied in the context of a comprehensive plan for their use, singly or in combination with other techniques. At a minimum, the plan should include:

- Appropriate approval authority;
- Supervisory requirements to insure appropriate application of methods;
- Specifics on the application of technique(s) including appropriate duration, intervals between applications and events that would require termination of the technique; and
- Requirements for the presence or availability (as appropriate) of qualified medical personnel.

(U) Implementation of approved exceptional techniques must be approved at the command authority level specified for the particular method.

### D. Potential Effects on Prosecutions

(U) Although the primary purpose of detainee interrogations is obtaining intelligence on imminent or planned terrorist attacks against the United States and its citizens or interests, the United States may later decide to prosecute detainees. This section will discuss whether evidence obtained in interrogations will be admissible in either military commissions or U.S. court proceedings.

(U) The stated objective of detainee interrogations is to obtain information of intelligence value. Information obtained as a result of interrogations may later be used in criminal prosecutions. Depending on the techniques employed, the admissibility of any information may depend on the forum considering the evidence. In addition, the admissibility of an admission or confession necessarily will be fact-specific, in that the exact techniques used with a specific detainee will determine whether the information will be admissible. Although the goal of intelligence interrogation is to produce a willingly cooperative and compliant subject, a successful interrogation nevertheless may produce a statement that might be argued to be involuntary for purposes of criminal proceedings.

(U) Prosecution by the United States is possible in a military commission, court-martial, or in an Article III court.

(U) The standard of admissibility for military commissions is simply whether the evidence has probative value to a reasonable person. *(Military Commissions Order No 1, para 6(D)(1)).* Although this is a fairly low threshold, many of the techniques may place a burden on the prosecution's ability to convince commission members that the evidence meets even that lower standard. As the interrogation methods increase in intensity, the likelihood that the information will be deemed coerced and involuntary and thus held inadmissible increases. Although voluntariness of the confession is not a specific threshold question on admissibility, it can reasonably be expected that the

defense will raise voluntariness, challenging the probative value of the information and hence, its admissibility. If the statement is admitted, voluntariness will undoubtedly be a factor considered by the members in determining the weight to be given the information.

(U) (~~S//NF~~) Any trials taking place in either U.S. federal courts or by courts-martial will be conducted pursuant to statutory and constitutional standards and limitations. To be admissible, statements made during interrogation must be determined to be voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The judge must first determine whether the statements were the product of free will, i.e., the defendant's will was not overborne by the interrogators. *Mincey v. Arizona*, 437 U.S. 385 (1978) (the defendant's will was simply overborne and due process of law requires that statements obtained as these were cannot be used in any way against the defendant at his trial). This issue can also be raised before the trier of fact. If the actions taken to secure a statement constitute torture, the statement would be inadmissible. *Brown v. Mississippi*, 297 U.S. 278 (1936) (confessions procured by means "revolting to the sense of justice" could not be used to secure a conviction). It should be noted that conduct does not need to rise to the level of "torture" or "cruel, inhuman and degrading treatment or punishment" for it to cause a statement to be considered involuntary, and therefore inadmissible. As such, the more aggressive the interrogation technique used, the greater the likelihood it could adversely affect the admissibility of any acquired statements or confessions.

(U) Mechanism for Challenge. The defense can be expected to challenge detainee statements through a motion to suppress the detainee statement or to challenge the entire proceeding through a motion to dismiss for egregious prosecutorial misconduct.

(U) (~~S//NF~~) Other Considerations. One of the Department of Defense's stated objectives is to use the detainees' statements in support of ongoing and future prosecutions. The method of obtaining these statements and its effect on voluntariness may also affect the usability of these statements against other accused in any criminal forum. Statements produced where the will of the detainee has been overborne will in all likelihood be viewed as inherently suspect and of questionable value.

(U) (~~S//NF~~) Consideration must be given to the public's reaction to methods of interrogation that may affect the military commission process. The more coercive the method, the greater the likelihood that the method will be met with significant domestic and international resistance. This in turn may lower international and domestic acceptance of the military commission process as a whole. In addition, the military commission will be faced with balancing the stated objective of open proceedings with the need not to publicize interrogation techniques. Consequently, having these techniques become public or substantially closing the proceedings in order to protect the techniques from disclosure could be counterproductive and could undermine confidence in the outcome. Finally, the timing of the prosecutions must be considered. Revelation of the techniques presumably will reduce their effectiveness against current and future detainees.

## E. International Considerations That May Affect Policy Determinations

(U) This section provides a discussion of international law that, although not binding on the United States, could be cited to by other countries to support the proposition that the interrogation techniques used by the U.S. contravene international legal standards. The purpose of providing this international law discussion is to inform the Department of Defense's policy considerations when deciding if, when and how to employ the interrogation techniques against unlawful combatants held outside the United States.

### 1. Geneva Conventions

(U) ~~(S//NF)~~ To the extent that other nation states do not concede the U.S. position that the Geneva Conventions do not apply to the detainees, there are several provisions of the Third Geneva Convention that may be relevant considerations regarding interrogation techniques.[63] Article 13 requires that POWs must at all times be treated humanely, and that any unlawful act or omission by the detaining power that causes death or seriously endangers the health of a POW will be regarded as a serious breach of the Convention. In addition, POWs must be protected against acts of violence or intimidation. Under Article 14 of the Convention, POWs are entitled to respect for their person and their honor. Article 17 prohibits physical or mental torture and any other form of coercion of POWs in order to secure information. POWs who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment. Article 130 provides that torture or inhuman treatment, or willfully causing great suffering or serious injury to body or health of a POW are considered "grave breaches" of the Convention. Article 129 of the Convention requires Parties to search for, extradite or prosecute those persons alleged to have committed, or have ordered to be committed, grave breaches.

(U) ~~(S//NF)~~ These articles of the Third Geneva Convention may provide an opportunity for other States Parties to allege that they consider the United States to be in violation of the Convention through its treatment of detainees. To the extent any such treatment could be considered by them to be torture or inhuman treatment, such acts could be considered "grave breaches" and punishable as war crimes.

(U) ~~(S//NF)~~ In addition, even if they argue that the Taliban and al Qaida detainees are not entitled to POW status, they may consider that the guarantees contained in Article 75 of the First Additional Protocol to the Geneva Conventions are measures by which the United States' actions could be evaluated. See, *infra*, this Section, paragraph 3. Additional arguments may be made by other nations that the protections of the Geneva Conventions are comprehensive and apply to unlawful combatants .[64]

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[63] (U) Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[64] (U) For example, other countries may argue as follows: The central theme of the Geneva Conventions is humanity. With regard to persons affected by armed conflict, Pictet's *Commentary* states: "In short, all the particular cases we have just been considering confirm a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international

## 2. Convention Against Torture

(U)

(~~S//NF~~) Article 7 of the Torture Convention requires that a State Party either extradite or prosecute a person found within its territory who has been alleged to have committed acts of torture.[65] As discussed, *supra*, the United States implemented this provision in Chapter 113C of Title 18, United States Code, which provides for federal criminal jurisdiction over an extraterritorial act or attempted act of torture, if the alleged offender is present in the United States, regardless of the nationality of the victim or the alleged offender. All States Parties to the Convention are required to establish this same jurisdiction in their countries. Accordingly, governments could potentially assert jurisdiction over U.S. personnel found in their territory, and attempt to prosecute them for conduct they consider to be violations of the Torture Convention.

## 3. Customary International Law/Views of Other Nations

(U) "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[66]

(U) The United States' primary obligation concerning torture and other related practices derives from the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment and Punishment. Although not consistent with U.S. views, some international commentators maintain that various human rights conventions and declarations (including the Geneva Conventions) represent "customary international law" binding on the United States.[67]

(U) Although not binding on the United States, the following international human rights instruments may inform the views of other nations as they assess the actions of the United States relative to detainees.

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law; he is either a prisoner of war, and as such covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law." Pictet, Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), Article 4, Paragraph 4, ICRC, Geneva, 1958. Other nations may disagree with the U.S. government view that GC IV is not applicable to those individuals detained in the war on terrorism and argue that GC IV protects those persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war. GC IV, Article 4; *see generally* Army Field Manual 27-10, *The Laws of Land Warfare* (1956), paragraphs 246-248. In fact, Pictet's *Commentary* on Article 4, paragraph 4 of GC IV states: "if, for some reason, prisoner of war status – to take one example – were denied to them [persons who find themselves in the hands of a party to the conflict], they would become protected persons under the present Convention." Further GC IV, Article 32 specifically prohibits the torture, corporal punishment, or physical suffering of protected persons. Accordingly, the United States may face the argument from other nations that the President may not place these detainees in an intermediate status, outside the law, and then arguably subject them to torture.

[65] (U) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force for the United States on Nov. 20, 1994, 1465 U.N.T.S. 85.

[66] (U) The Restatement (Third) of the Foreign Relations Law of the U.S, § 102(2).

[67] (U) See, e.g., McDougal, Lasswell, and Chen, Human Rights and World Public Order (1980).

(U) One of the first major international declarations on human rights protections was the 1948 Universal Declaration of Human Rights (adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810). This Declaration, which is not itself binding or enforceable against the United States, states at Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Although there is a specific definition for "torture" in the subsequent 1994 Convention Against Torture, there is no commonly accepted definition in the international community of the terms "cruel, inhuman, and degrading punishment or treatment."

(U) The American Convention on Human Rights[68] was signed by the United States in 1977 but the United States never ratified it. It states in Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment," and that "all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

(U) In 1975, the U. N. General Assembly adopted the Declaration on Protection of All Persons from Being Subjected to Torture and other Cruel, Inhumane or Degrading Punishment (G.A. Res 34/52, U.N. Doc. A/10034). As with previous U. N. declarations, the Declaration itself is not binding on nations. This Declaration provides (Article 2) that the proscribed activities are "an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights."

(U) Article 75 of the First Additional Protocol to the Geneva Conventions, to which the U. S. is not a party, prohibits physical and mental torture, outrages upon personal dignity (in particular humiliating and degrading treatment), or threats to commit any of the foregoing against detainees "who do not benefit from more favorable treatment under the [Geneva] Conventions."[69] (The First Additional Protocol does not define any of these terms.) According to International Committee of the Red Cross (ICRC) Commentaries, where the status of a prisoner of war or of a protected person is denied to an individual, the protection of Article 75 must be provided to them at a minimum.[70]

(U) The Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides, *inter alia*, that persons protected by the Civilians Convention are those who, at a given moment and in any manner whatsoever, find themselves in the hands of a Party to the conflict that is a country of which they are not nationals.[71] Such persons are at all times to be treated humanely and protected against all acts of violence

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[68] (U) 1144 U.N.T.S. 123 (Nov. 22, 1969).

[69] (U) Protocal Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

[70] (U) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, at 863-65 (1987).

[71] (U) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3365, 75 U.N.T.S 287, see Articles 4 and 27.

or threats thereof. The Department of Justice has determined that this Convention applies only to civilians but does not apply to unlawful combatants.[72]

### 4. International Criminal Court

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~~(S//NF)~~ The Rome Statute of the International Criminal Court (ICC),[73] which the U. S. has made clear it opposes and to which it has no intention of becoming a party, contains provisions prohibiting the infliction of severe physical or mental pain or suffering (including for such purposes as obtaining information). These violations are considered by the signatories to be war crimes of torture and of inhuman treatment (Article 8) and crimes against humanity (Article 7). The affected persons must be protected under one or more of the Geneva Conventions in order for the prohibition to be applicable. Other governments could take a position contrary to the U.S. position on this point. For those State Parties to the ICC that take the position that the ICC grants universal jurisdiction to detain individuals suspected of committing prohibited acts, if these countries obtain control over U.S. personnel, they may view it as within their jurisdiction to surrender such personnel to the ICC. In an effort to preclude this possibility, the United States is currently negotiating "Article 98" agreements with as many countries as possible to provide for protection of U.S. personnel from surrender to the ICC.[74]

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~~(S//NF)~~ States with whom the United States has not concluded Article 98 agreements, and that perceive certain interrogation techniques to constitute torture or inhuman treatment, may attempt to use the Rome Statute to prosecute individuals found in their territory responsible for such interrogations.[75] In such cases, the U.S. Government will reject as illegitimate any attempt by the ICC, or a state on its behalf, to assert the jurisdiction of the Rome Statute over U.S. nationals without the prior express consent of the United States.

## V. Techniques

(U) The purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators.

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[72] (U) Other nations, which, unlike the United States, have accepted Article 75, may argue that since the Taliban and al-Qaida detainees are not entitled to POW status under the Geneva Conventions, Article 75 should be applicable as customary international law, notwithstanding their status as unlawful combatants.
[73] (U) Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998).
[74] (U) Parties to the Rome Statute are obligated to surrender individuals at the request of the ICC for prosecution, unless such surrender would be inconsistent with the requested state's obligations "under an international agreement pursuant to which the consent of the sending state is required to surrender a person of that state to the ICC." (Rome Statute, Article 98 (2)). While the U.S. is not a party to the Rome Statute, Article 98 agreements would provide an exception to an ICC party's general obligation to surrender persons.
[75] (U) Article 25(3) of the Rome Statute provides individual criminal responsibility for a person who, *inter alia*, "orders, solicits, or induces" or otherwise facilitates through aiding, abetting, or assisting in the commission of a crime.

Operating instructions must be developed based on command policies to insure uniform, careful, and safe application of any interrogations of detainees.

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(~~S//NF~~) Interrogations must always be planned, deliberate actions that take into account numerous, often interlocking factors such as a detainee's current and past performance in both detention and interrogation, a detainee's emotional and physical strengths and weaknesses, an assessment of possible approaches that may work on a certain detainee in an effort to gain the trust of the detainee, strengths and weaknesses of interrogators, and augmentation by other personnel for a certain detainee based on other factors.

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(~~S//NF~~) Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals. The policies established by the detaining units that pertain to searching, silencing, and segregating also play a role in the interrogation of a detainee. Detainee interrogation involves developing a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration of interrogation techniques and oversight is essential.

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(~~S//NF~~) Listed below are interrogation techniques all believed to be effective but with varying degrees of utility. Techniques 1-19, 22-26 and 30, applied singly, are purely verbal and/or involve no physical contact that could produce pain or harm and no threat of pain or harm. It is important that interrogators be provided reasonable latitude to vary techniques depending on the detainee's culture, strengths, weaknesses, environment, extent of training in resistance techniques as well as the urgency of obtaining information that the detainee is known to have. Each of the techniques requested or suggested for possible use for detainees by USSOUTHCOM and USCENTCOM is included. Some descriptions include certain limiting parameters; these have been judged appropriate by senior interrogators as to effectiveness.

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(~~S//NF~~) *While techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques to be employed must be considered before any decisions are made regarding approval for particular situations.* The title of a particular technique is not always fully descriptive of a particular technique. With respect to the employment of any techniques involving physical contact, stress or that could produce physical pain or harm, a detailed explanation of that technique must be provided to the decision authority prior to any decision.

Note: Techniques 1-17 are further explained in Field Manual 34-52.

1. U
(~~S//NF~~) Direct: Asking straightforward questions.

2. (U) ~~(S//NF)~~ **Incentive/Removal of Incentive:** Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees, (Privileges above and beyond POW-required privileges).

3. (U) ~~(S//NF)~~ **Emotional Love:** Playing on the love a detainee has for an individual or group.

4. (U) ~~(S//NF)~~ **Emotional Hate:** Playing on the hatred a detainee has for an individual or group.

5. (U) ~~(S//NF)~~ **Fear Up Harsh:** Significantly increasing the fear level in a detainee.

6. (U) ~~(S//NF)~~ **Fear Up Mild:** Moderately increasing the fear level in a detainee.

7. (U) ~~(S//NF)~~ **Reduced Fear:** Reducing the fear level in a detainee.

8. (U) ~~(S//NF)~~ **Pride and Ego Up:** Boosting the ego of a detainee.

9. (U) ~~(S//NF)~~ **Pride and Ego Down:** Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW.

10. (U) ~~(S//NF)~~ **Futility:** Invoking the feeling of futility of a detainee.

11. (U) ~~(S//NF)~~ **We Know All:** Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

12. (U) ~~(S//NF)~~ **Establish Your Identity:** Convincing the detainee that the interrogator has mistaken the detainee for someone else.

13. (U) ~~(S//NF)~~ **Repetition Approach:** Continuously repeating the same question to the detainee within interrogation periods of normal duration.

14. (U) ~~(S//NF)~~ **File and Dossier:** Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.

15. (U) ~~(S//NF)~~ **Mutt and Jeff:** A team consisting of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique.

16. (U) ~~(S//NF)~~ **Rapid Fire:** Questioning in rapid succession without allowing detainee to answer.

17. (U) ~~(S//NF)~~ **Silence:** Staring at the detainee to encourage discomfort.

18. (U) ~~(S//NF)~~ **Change of Scenery Up:** Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

19. (U ~~S//NF~~) **Change of Scenery Down**: Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

20. (U ~~S//NF~~) **Hooding**: This technique is questioning the detainee with a blindfold in place. For interrogation purposes, the blindfold is not on other than during interrogation.

21. (U ~~S//NF~~) **Mild Physical Contact:** Lightly touching a detainee or lightly poking the detainee in a completely non-injurious manner. This also includes softly grabbing of shoulders to get the detainee's attention or to comfort the detainee.

22. (U ~~S//NF~~) **Dietary Manipulation:** Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

23. (U ~~S//NF~~) **Environmental Manipulation:** Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times.

24. (U ~~S//NF~~) **Sleep Adjustment:** Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

25. (U ~~S//NF~~) **False Flag:** Convincing the detainee that individuals from a country other than the United States are interrogating him.

26. (U ~~S//NF~~) **Threat of Transfer:** Threatening to transfer the subject to a 3rd country that subject is likely to fear would subject him to torture or death. (The threat would not be acted upon nor would the threat include any information beyond the naming of the receiving country.)

(U ~~S//NF~~) The following list includes additional techniques that are considered effective by interrogators, some of which have been requested by USCENTCOM and USSOUTHCOM. They are more aggressive counter-resistance techniques that may be appropriate for detainees who are extremely resistant to the above techniques, and who the interrogators strongly believe have vital information. All of the following techniques indicate the need for technique-specialized training and written procedures to insure the safety of all persons, along with appropriate, specified levels of approval and notification for each technique.

27. (U ~~S//NF~~) **Isolation**: Isolating the detainee from other detainees while still complying with basic standards of treatment.

28. (U ~~S//NF~~) **Use of Prolonged Interrogations**: The continued use of a series of approaches that extend over a long period of time (e.g., 20 hours per day per interrogation).

29. (U) ~~(S//NF)~~ **Forced Grooming**: Forcing a detainee to shave hair or beard. (Force applied with intention to avoid injury. Would not use force that would cause serious injury.)

30. (U) ~~(S//NF)~~ **Prolonged Standing:** Lengthy standing in a "normal" position (non-stress). This has been successful, but should never make the detainee exhausted to the point of weakness or collapse. Not enforced by physical restraints. Not to exceed four hours in a 24-hour period.

31. (U) ~~(S//NF)~~ **Sleep Deprivation**: Keeping the detainee awake for an extended period of time. (Allowing individual to rest briefly and then awakening him, repeatedly.) Not to exceed 4 days in succession.

32. (U) ~~(S//NF)~~ **Physical Training:** Requiring detainees to exercise (perform ordinary physical exercises actions) (e.g., running, jumping jacks); not to exceed 15 minutes in a two-hour period; not more than two cycles, per 24-hour periods) Assists in generating compliance and fatiguing the detainees. No enforced compliance.

33. (U) ~~(S//NF)~~ **Face slap/ Stomach slap:** A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures and do not cause pain or injury. They are only effective if used once or twice together. After the second time on a detainee, it will lose the shock effect. Limited to two slaps per application; no more than two applications per interrogation.

34. (U) ~~(S//NF)~~ **Removal of Clothing:** Potential removal of all clothing; removal to be done by military police if not agreed to by the subject. Creating a feeling of helplessness and dependence. This technique must be monitored to ensure the environmental conditions are such that this technique does not injure the detainee.

35. (U) ~~(S//NF)~~ **Increasing Anxiety by Use of Aversions:** Introducing factors that of themselves create anxiety but do not create terror or mental trauma (e.g., simple presence of dog without directly threatening action). This technique requires the commander to develop specific and detailed safeguards to insure detainee's safety.

## VI. Evaluation of Useful Techniques

(U) ~~(S//NF)~~ The working group considered each of the techniques enumerated in Section V, *supra*, in light of the legal, historical, policy and operational considerations discussed in this paper. In the course of that examination it became apparent that any decision whether to authorize a technique is essentially a risk benefit analysis that generally takes into account the expected utility of the technique, the likelihood that any technique will be in violation of domestic or international law, and various policy considerations. Generally, the legal analysis that was applied is that understood to comport with the views of the Department of Justice. Although the United States, as a practical matter, may be the arbiter of international law in deciding its application to our national activities, the views of other nations are relevant in considering their reactions,

potential effects on our captured personnel in future conflicts, and possible liability to prosecution in other countries and international forums for interrogators, supervisors and commanders involved in interrogation processes and decisions.

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~~(S//NF)~~ The Conclusions section of this analysis, *infra*, summarizes salient conclusions that were applied to our analysis of individual techniques. As it suggests, the lawfulness and the effectiveness of individual techniques will, in practice, depend on the specific facts. The lawfulness will depend in significant part on procedural protections that demonstrate a legitimate purpose and that there was no *intent* to inflict significant mental or physical pain – and, in fact, avoid that. Because of this, the assessment of each technique presumed that the safeguards and procedures described in the "DOD-Specific Policy Considerations" section of this paper would be in place. The importance of this is underscored by the fact that, in practice, techniques are usually applied in combination, and as the legal analysis of this paper indicates, the significance and effect on an individual detainee of the specific combination of techniques employed, and their manner of application will determine the lawfulness of any particular interrogation.

U

~~(S//NF)~~ In addition, the lawfulness of the application of any particular technique, or combination of techniques, may depend on the practical necessity for imposition of the more exceptional techniques. As the analysis explains, legal justification for action that could otherwise be unlawful (e.g., relying upon national necessity and self-defense) depends in large part on whether the specific circumstances would justify the imposition of more aggressive techniques. Interrogation of an individual known to have facts essential to prevent an immediate threat of catastrophic harm to large populations may support use of "exceptional" techniques, particularly when milder techniques have been unavailing. But this is a determination that will always be case-specific. Consequently, use of each technique should be a decision level appropriate to the gravity of the particular case (both for the nation and for the detainee).

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~~(S//NF)~~ The chart at Attachment 3 reflects the result of the risk/ benefit assessment for each technique considered, "scored" for each technique, relevant considerations and given an overall recommendation. In addition, it notes specific techniques that, based on this evaluation, should be considered "exceptional techniques" (marked with an "E") subject to particular limitations described in the "DOD-Specific Policy Considerations" section (generally, not routinely available to interrogators, use limited to specifically designated locations and specifically trained interrogators, special safeguards, and appropriately senior employment decision levels specified). For each "exceptional" technique, a recommendation for employment decision level is indicated as well.

## VII. Conclusions Relevant to Interrogation of Unlawful Combatants Under DOD Control Outside the United States

(U) ~~(S//NF)~~ As a result of the foregoing analysis of legal, policy, historical, and operational considerations, the following general conclusions can be drawn relevant to interrogation of unlawful combatants captured in the war on terrorism under DOD control outside the United States:

(U) ~~(S//NF)~~ Under the Third Geneva Convention, U.S. forces are required to treat captured personnel as POWs until an official determination is made as to their status. Once a determination has been made that captured personnel are unlawful combatants, as is currently the case with captured Taliban and Al Qaida operatives, they do not have a right to the protections of the Third Geneva Convention.

(U) Customary international law does not provide legally-enforceable restrictions on the interrogation of unlawful combatants under DOD control outside the United States.

(U) The United States Constitution does not protect those individuals who are not United States citizens and who are outside the sovereign territory of the United States.

(U) ~~(S//NF)~~ Under the Torture Convention, no person may be subjected to torture. Torture is defined as an act specifically *intended* to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to *prolonged* mental harm caused by or resulting from (1) the *intentional* infliction or *threatened infliction of severe physical pain or suffering*; (2) the administration or application, or threatened application, of mind altering substances or other procedures *calculated* to disrupt profoundly the senses or personality; (3) the threat of imminent death; or (4) the threat that another person will *imminently* be subjected to death, severe physical pain or suffering, or the administration or application, or threatened application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(U) ~~(S//NF)~~ Under the Torture Convention, no person may be subjected to cruel, inhuman or degrading treatment. The United States has defined its obligations under the Torture Convention as conduct prohibited by the 5th, 8th, and 14th Amendments to the Constitution of the United States. These terms, as defined by U.S. courts, could be understood to mean: to inflict pain or harm without a legitimate purpose; to inflict pain or injury for malicious or sadistic reasons; to deny the minimal civilized measures of life's necessities and such denial reflects a deliberate indifference to health and safety; and to apply force and cause injury so severe and so disproportionate to the legitimate government interest being served that it amounts to a brutal and inhumane abuse of official power literally shocking the conscience.

(U) For actions outside the United States and the special maritime and territorial jurisdiction of the United States, 18 U.S.C. § 2340 applies. For actions occurring within the United States and the special maritime and territorial jurisdiction of the United States, various Federal statutes would apply.

(U) (S//NF) The President has directed, pursuant to his Military Order dated November 13, 2001, that the U.S. Armed Forces treat detainees humanely and that the detainees be afforded adequate food, drinking water, shelter, clothing and medical treatment.

(U) (S//NF) Pursuant to the Confidential Presidential Determination, dated February 7, 2002, the U.S Armed Forces are to treat detainees in a manner consistent with the *principles* of Geneva, to the extent *appropriate* and consistent with *military necessity.*

(U) Under Article 10 of the Torture Convention, the United States is obligated to ensure that law enforcement and military personnel involved in interrogations are educated and informed regarding the prohibition against torture, and under Article 11, systematic reviews of interrogation rules, methods, and practices are also required.

(U) Members of the U.S. Armed Forces are, at all times and all places, subject to prosecution under the UCMJ for, among other offenses, acts which constitute assault, assault consummated by a battery, assault with the intent to inflict grievous bodily harm, manslaughter, unpremeditated murder, and maltreatment of those subject to their orders. Under certain circumstances, civilians accompanying the Armed Forces may be subject to the UCMJ.

(U) Civilian employees and employees of DOD contractors may be subject to prosecution under the Federal Criminal Code for, among other offenses, acts which constitute assault (in various degrees), maiming, manslaughter, and murder.

(U) (S//NF) Defenses relating to Commander-in-Chief authority, necessity and self-defense or defense of others may be available to individuals whose actions would otherwise constitute these crimes, and the extent of availability of those defenses will be fact-specific. Certain relevant offenses require specific intent to inflict particular degrees of harm or pain, which could be refuted by evidence to the contrary (e.g., procedural safeguards). Where the Commander-in-Chief authority is being relied upon, a Presidential written directive would serve to memorialize this authority.

(U) (S//NF) The lawfulness and appropriateness of the use of many of the interrogation techniques we examined can only be determined by reference to specific details of their application, such as appropriateness and safety for the particular detainee, adequacy of supervision, specifics of the application including their duration, intervals between applications, combination with other techniques, and safeguards to avoid harm (including termination criteria and the presence or availability of qualified medical personnel.) (We have recommended appropriate guidance and protections.)

(U) (S//NF) Other nations, including major partner nations, may consider use of techniques more aggressive than those appropriate for POWs violative of international law or their own domestic law, potentially making U.S. personnel involved in the use of such techniques subject to prosecution for perceived human rights violations in other

nations or to being surrendered to international fora, such as the ICC; this has the potential to impact future operations and overseas travel of such personnel.

(U) (S//NF) Some nations may assert that the U.S. use of techniques more aggressive than those appropriate for POWs justifies similar treatment for captured U.S. personnel.

(U) (S//NF) Should information regarding the use of more aggressive interrogation techniques than have been used traditionally by U.S. forces become public, it is likely to be exaggerated or distorted in the U.S. and international media accounts, and may produce an adverse effect on support for the war on terrorism.

(U) (S//NF) The more aggressive the interrogation technique used, the greater the likelihood that it will affect adversely the admissibility of any acquired statements or confessions in prosecutions against the person interrogated, including in military commissions (to a lesser extent than in other U.S. courts).

(U) (S//NF) Carefully drawn procedures intended to prevent unlawful levels of pain or harm not only serve to avoid unlawful results but should provide evidence helpful to demonstrate that the specific intent required for certain offenses did not exist.

(U) (S//NF) General use of exceptional techniques (generally, having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations. They should therefore be employed with careful procedures and only when fully justified.

(U) (S//NF) Participation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces.[76]

(U) (S//NF) The use of exceptional interrogation techniques should be limited to specified strategic interrogation facilities; when there is a good basis to believe that the detainee possesses critical intelligence; when the detainee is medically and operationally evaluated as suitable (considering all techniques in combination); when interrogators are specifically trained for the technique(s); a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel); when there is appropriate supervision; and, after obtaining appropriate specified senior approval level for use with any specific detainee (after considering the foregoing and receiving legal advice).

[76] Those techniques considered in this review that raise this concern are relatively few in number and generally indicated by yellow or red (or green with a significant footnote) under major partner views in Attachment 3.

## VIII. Recommendations

(U) We recommend:

(U S/NF) 1. The working group recommends that techniques 1-26 on the attached chart be approved for use with unlawful combatants outside the United States, subject to the general limitations set forth in this Legal and Policy Analysis; and that techniques 27-35 be approved for use with unlawful combatants outside the United States subject to the general limitations as well as the specific limitations regarding "exceptional" techniques as follows: conducted at strategic interrogation facilities; where there is a good basis to believe that the detainee possesses critical intelligence; the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); interrogators are specifically trained for the technique(s); a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) is developed; appropriate supervision is provided; and, appropriate specified senior level approval is given for use with any specific detainee (after considering the foregoing and receiving legal advice).

(U S/NF) 2. SECDEF approve the strategic interrogation facilities that are authorized to use the "exceptional techniques" (such facilities at this time include Guantanamo, Cuba; additional strategic interrogation facilities will be approved on a case-by-case basis).

(U S/NF) 3. As the Commander-in-Chief authority is vested in the President, we recommend that any exercise of that authority by DOD personnel be confirmed in writing through Presidential directive or other document.

(U S/NF) 4. That DOD policy directives and implementing guidance be amended as necessary to reflect the determinations in paragraph one and subsequent determinations concerning additional possible techniques.

(U S/NF) 5. That commanders and supervisors, and their legal advisers, involved with the decisions related to employment of "exceptional techniques" receive specialized training regarding the legal and policy considerations relevant to interrogations that make use of such techniques.

(U S/NF) 6. That OASD (PA) prepare a press plan to anticipate and address potential public inquiries and misunderstandings regarding appropriate interrogation techniques.

(U S/NF) 7. That a procedure be established for requesting approval of additional interrogation techniques similar to that for requesting "supplementals" for ROEs; the process should require the requestor to describe the technique in detail, justify its utility, describe the potential effects on subjects, known hazards and proposed safeguards, provide a legal analysis, and recommend an appropriate decision level regarding use on specific subjects. This procedure should ensure that SECDEF is the approval authority for the addition of any technique that could be considered equivalent in degree to any of the "exceptional techniques" addressed in this report (in the chart numbers 27-35, labeled with an "E"), and that he establish the specific decision level required for application of such techniques.

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(~~S//NF~~) 8. DOD establish specific understandings with other agencies using DOD detailed interrogators regarding the permissible scope of the DOD interrogator's activities.

Classified by: Secretary Rumsfeld
Reason: 1.5(C)
Declassify on: 10 years

Red
Yellow
Green

# War on Terrorism
## Detainee Interrogation Working Group
## Summary of Analysis and Recommendations
## Pertaining to Unlawful Combatants Outside of the U.S.[1]

| | Utility | Law IAW U.S. Interpretation | | |
|---|---|---|---|---|
| Proposed Interrogation Techniques [2] (see attached description/limitations) | Contribution to Intelligence Collection (Useful) | Torture Convention [Torture] | Torture Convention [Cruel, Inhuman Degrading] | U.S. Domestic Law |
| 1. Direct | High | | | |
| 2. Incentive or Removal | High | | | |
| 3. Emotional Love | High | | | |
| 4. Emotional Hate | High | | | |
| 5. Fear Up Harsh | High | | | |
| 6. Fear Up Mild | High | | | |
| 7. Reduced Fear | High | | | |
| 8. Pride and ego up | High | | | |
| 9. Pride and ego down | High | | | |
| 10. Futility | High | | | |
| 11. We Know All | High | | | |
| 12. Establish Your Identity | High | | | |

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.
Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote).
Red indicates major issue in area of consideration that cannot be eliminated.

Red
Yellow
Green

# War on Terrorism
# Detainee Interrogation Working Group
# Summary of Analysis and Recommendations Pertaining to Unlawful Combatants Outside of the U.S.[1]

| Proposed Interrogation Techniques [2] (see attached description/limitations) | Policy | | | | | | | Recommendation |
|---|---|---|---|---|---|---|---|---|
| | Consistency with Historical U.S. Forces Interrogation Role | Consistency with Prior U.S. Public Statements | Consistency with Major Partner Nation Views | Effect on Captured U.S. Forces | Potential Adverse Effect for Participants/ Supervisors/COC | Potential Effect on Detainee Prosecutions | Other | Re Unlawful Combatants |
| 1. Direct | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 2. Incentive or Removal | Green | Green | Yellow [3] | Green | Green | Green [4] | Yellow | Green |
| 3. Emotional Love | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 4. Emotional Hate | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 5. Fear Up Harsh | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 6. Fear Up Mild | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 7. Reduced Fear | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 8. Pride and ego up | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 9. Pride and ego down | Green | Green | Yellow [5] | Green | Green | Green | Yellow | Green |
| 10. Futility | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 11. We Know All | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 12. Establish Your Identity | Green | Green | Green | Green | Green | Green | Yellow | Green |

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.
Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote).
Red indicates major issue in area of consideration that cannot be eliminated.

● Red
○ Yellow
○ Green

| Proposed Interrogation Techniques [2] (see attached description/limitations) | Utility | Law IAW U.S. Interpretation | | |
|---|---|---|---|---|
| | Contribution to Intelligence Collection (Useful) | Torture Convention [Torture] | Torture Convention [Cruel, Inhuman Degrading] | U.S. Domestic Law |
| 13. Repetition Approach | Low | ● | ● | ● |
| 14. File and Dossier | High | ● | ● | ● |
| 15. Mutt and Jeff | High | ● | ● | ● |
| 16. Rapid Fire | High | ● | ● | ● |
| 17. Silence | Medium | ● | ● | ● |
| 18. Change of Scenery Up | High | ● | ● | ● |
| 19. Change of Scenery Down | High | ● | ● | ● |
| 20. Hooding | High | ● | ● | ● |
| 21. Mild Physical Contact | High | ● | ● | ● |
| 22. Dietary Manipulation | High | ● | ● | ● |
| 23. Environmental manipulation | High | ● | ● | ● |
| 24. Sleep Adjustment | High | ● | ● | ● |
| 25. False Flag | High | ● | ● | ● |

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.
Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote).
Red indicates major issue in area of consideration that cannot be eliminated.

Red
Yellow
Green

| Proposed Interrogation Techniques [2] (see attached description/limitations) | Policy | | | | | | | Recommendation |
|---|---|---|---|---|---|---|---|---|
| | Consistency with Historical U.S. Forces Interrogation Role | Consistency with Prior U.S. Public Statements | Consistency with Major Partner Nation Views | Effect on Captured U.S. Forces | Potential Adverse Effect for Participants/ Supervisors/COC | Potential Effect on Detainee Prosecutions | Other | Re Unlawful Combatants |
| 13. Repetition Approach | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 14. File and Dossier | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 15. Mutt and Jeff | Green | Green | Yellow [6] | Green | Green | Green | Yellow | Green |
| 16. Rapid Fire | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 17. Silence | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 18. Change of Scenery Up | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 19. Change of Scenery Down | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 20. Hooding | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 21. Mild Physical Contact | Green | Green | Green | Green [7] | Green | Green | Yellow | Green |
| 22. Dietary Manipulation | Green | Green | Green | Green | Green | Green | Yellow | Green |
| 23. Environmental Manipulation | Green | Green | Green [8] | Green | Green | Green | Yellow | Green |
| 24. Sleep Adjustment | Green | Green | Green | Green | Green | Green [9] | Yellow | Green |
| 25. False Flag | Green | Green | Green | Green | Green | Green | Yellow | Green |

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.
Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote).
Red indicates major issue in area of consideration that cannot be eliminated.

● Red
○ Yellow
○ Green

| Proposed Interrogation Techniques [2] (see attached description/limitations) | Utility: Contribution to Intelligence Collection (Useful) | Law IAW U.S. Interpretation: Torture Convention [Torture] | Torture Convention [Cruel, Inhuman Degrading] | U.S. Domestic Law |
|---|---|---|---|---|
| 26. Threaten to transfer to a 3rd country | Medium | ● | ● | ● |
| 27. Isolation | High | ● [11] | ● [12] | ● [13] |
| 28. Use of Prolonged interrogations | High [17] | ● | ● | ● |
| 29. Forced Grooming | High | ● | ● [19] | ○ [20] |
| 30. Prolonged Standing | High | ● | ● | ● |
| 31. Sleep Deprivation | High | ● | ● | ● |
| 32. Physical Training | High | ● | ● | ● |
| 33. Face or Stomach Slap | High | ● | ● | ● |
| 34. Removal of Clothing | High | ● | ○ [34] | ○ [35] |
| 35. Increasing Anxiety by Use of Aversions | High | ● | ○ [38] | ○ [39] |

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards.
Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote).
Red indicates major issue in area of consideration that cannot be eliminated.

Red
Yellow
Green

| Proposed Interrogation Techniques [2] (see attached description/limitations) | Policy | | | | | | | Recommendation |
|---|---|---|---|---|---|---|---|---|
| | Consistency with Historical U.S. Forces Interrogation Role | Consistency with Prior U.S. Public Statements | Consistency with Major Partner Nation Views | Effect on Captured U.S. Forces | Potential Adverse Effect for Participants/ Supervisors/COC | Potential Effect on Detainee Prosecutions | Other | Re Unlawful Combatants |
| 26. Threaten to transfer to a 3rd country | | | | | | 10 | | |
| 27. Isolation | 14 | | 15 | | | 16 | | E (Cbt.C) |
| 28. Use of Prolonged interrogations | | | | | | 18 | | E (GO/FO) |
| 29. Forced Grooming | 21 | | 22 | | | | | E (GO/FO) |
| 30. Prolonged Standing | | | | | | 23 | | E (GO/FO) |
| 31. Sleep Deprivation | | | 24 | | | 25 | 26 | E (Cbt.C) |
| 32. Physical Training | | | | | | 27 | | E (GO/FO) |
| 33. Face or Stomach Slap | 28 | | 29 | 30 | 31 | 32 | 33 | E (GO/FO) |
| 34. Removal of Clothing | | | | 36 | | | 37 | E (Cbt.C) |
| 35. Increasing Anxiety by Use of Aversions | | | | 40 | | 41 | | E (Cbt.C) |

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards. Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote). Red indicates major issue in area of consideration that cannot be eliminated.

# General Comments on Techniques Chart

"E" denotes recommendation that technique be considered "exceptional" and subject to the following limitations: (i) limited to use only at strategic interrogation facilities; (ii) there is a good basis to believe that the detainee possesses critical intelligence; (iii) the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); (iv) interrogators are specifically trained for the technique(s); (v) a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) has been developed; (vi) there is appropriate supervision; and, (vii) there is appropriate specified senior approval for use with any specific detainee (after considering the foregoing and receiving legal advice).

"(Cbt.C)" denotes recommendation that approval level for use of technique for a specific detainee be no lower than the Combatant Commander.

"(GO/FO)" denotes recommendation that approval level for use of technique for a specific detainee be no lower than a General Officer or Flag Officer.

The title of a particular technique is not always fully descriptive of a particular technique. With respect to the employment of any techniques involving physical contact or stress or that could produce physical pain or harm, a detailed explanation of that technique must be provided to the decision authority prior to any decision.

**Recommendation: The working group recommends that techniques 1-26 be approved for use with unlawful combatants outside the U.S. subject to the general limitations set forth in the Legal and Policy Analysis; and that techniques 27-35 be approved for use with unlawful combatants outside the U.S. subject to the general limitations as well as the specific limitations regarding "exceptional" techniques set forth above and in the Legal and Policy Analysis. If additional techniques are requested for use in the future, sufficient information regarding the technique must be provided to the appropriate command authority so that a legal/policy analysis can be conducted and recommendations for use made.**

Note: Green denotes no significant constraint on use raised by the respective area of consideration listed at top of each column, assuming adequate procedural safeguards. Yellow indicates area of consideration does not preclude use but there are problematic aspects that cannot be eliminated by procedural safeguards (see footnote). Red indicates major issue in area of consideration that cannot be eliminated.

## Footnotes

1. These recommendations assume that procedures and safeguards substantially similar to those set forth in the "Policy" Section of the Legal and Policy Analysis are followed. **The analysis relates to each individual technique; use of techniques in combination could significantly affect the legality and wisdom of their application.**

2. Techniques 1-19, 22-26, 30 and 35, applied singly, are purely verbal and/or involve no physical contact that could produce pain or harm; no threat of pain or harm.

3. *As a matter of policy, for countries that assert that POW protections should apply to detainees*: Other nations may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34).

4. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

5. *For countries that assert that POW protections apply to detainees*: Article 17 of Geneva III provides, "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."

6. *As a matter of policy, for countries that assert that POW protections should apply to detainees*: Would be inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation.

7. *As a matter of policy, for countries that assert that POW protections should apply to detainees*: Possible that other nations would disregard "mild" aspect and use as justification for abuse of U.S. POWs.

8. International case law suggests that technique might in some circumstances be viewed by other countries as inhumane.

9. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

10. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

## Footnotes (cont'd)

11. The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command.

12. To avoid implementation that could transgress, the use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command.

13. To avoid implementation that could transgress, the use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command.

14. Not known to have been generally used for interrogation purposes for longer than 30 days.

15. *As a matter of policy, for countries that assert that POW protections should apply to detainees*: Would be inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion (see commentary to paragraph 4), and Article 126 which ensures access and basic standards of treatment.

16. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

17. Utility is "high" for the first four to five days, "medium" for the following four to six days, and "low" thereafter.

18. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

19. Where there are religious or cultural sensitivities, this technique could raise issue of "degrading" if not applied in accordance with general limitations.

20. At practical level, may raise issues whether excessive force was used.

## Footnotes (cont'd)

21. This technique has not been used historically by U.S. forces. As such, no color code was assigned.

22. This technique could be viewed by major partner nations as degrading in some circumstances.

23. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

24. As a matter of policy, for consideration of other nations' views, the Committee against Torture, established under Article 17 of the Convention Against Torture (CAT), has interpreted "sleep deprivation for prolonged periods" to be a violation of both Article 16 of the CAT as cruel, inhuman, or degrading treatment as well as constituting torture under Article 1 of the CAT. Concluding Observations of the Committee against Torture, U.N. Doc. A/52/44, paragraphs 253-260. See also, Judgment on the Interrogation Methods Applied by the GSS, Nos HC 5100/94, HC 4054/95, HC 5188/96, HC 7563/97, HC 7628/97, HC 1043/99 (Sup Ct of Israel, sitting as the High Court of Justice, Sep 6, 1999). Finally, the European Court of Human Rights (ECHR) has held that sleep deprivation, in conjunction with four other problematic techniques (wall standing, hooding, subjection to noise, and deprivation of food and drink), did constitute "inhuman and degrading treatment". Ireland v. United Kingdom, 25 Eur. Ct. H.R. (Ser. A) (1978).

25. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

26. Knowledge of this technique may have a significant adverse effect on public opinion.

27. May affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

28. Technique used historically until the Vietnam war, however not officially sanctioned.

29. As a matter of policy, for consideration of other nations' views, the Committee against Torture has generally denounced the use of "moderate physical pressure" as a permissible interrogation technique. See also, Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (Ser. A) (1978) (spanking of student with 3 lashes of a birch rod violated European Convention on Human Rights). See also, Article 5 of the American Convention on Human Rights prohibits not only "torture" and "cruel, inhuman or degrading punishment or treatment" but it also provides that: "Every person has the right to have his physical, mental, and moral integrity respected."

## Footnotes

30. As a matter of policy, other nations could interpret this as condoning assault on the detainee and encourage the use against U.S. POWs.

31. Potential to be subject to charge of assault in international jurisdictions.

32. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

33. Knowledge of this technique may have significant adverse effect on public opinion.

34. Depending on application of technique, could be construed as degrading.

35. At practical level, may raise issues whether excessive force was used as force may be required to remove clothing.

36. Other nations may use as excuse to apply to U.S. POWs.

37. Knowledge of this technique may have a significant adverse effect on public opinion.

38. Legal exposure would be dependant on specific technique employed. Depending on technique used and subject response, potential exists that technique could be viewed as violating $5^{th}/8^{th}/14^{th}$ Amendment standards, and therefore violate U.S. interpretation of Torture Convention.

39. Legal exposure would be dependant on specific technique employed. Depending on technique used and subject response, potential exists that technique could be viewed as violating $5^{th}/8^{th}/14^{th}$ Amendment standards, and therefore violate U.S. interpretation of Torture Convention.

40. Could provide basis for other nations to justify use of more aggravated mental techniques on U.S. POWs.

41. May significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).

# Description of Interrogation Techniques

1. **Direct**: Asking straightforward questions.
2. **Incentive/Removal of Incentive**: Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees.
3. **Emotional Love**: Playing on the love a detainee has for an individual or group.
4. **Emotional Hate**: Playing on the hatred a detainee has for an individual or group.
5. **Fear Up Harsh**: Significantly increasing the fear level in a detainee.
6. **Fear Up Mild**: Moderately increasing the fear level in a detainee.
7. **Reduced Fear**: Reducing the fear level in a detainee.
8. **Pride and Ego Up**: Boosting the ego of a detainee.
9. **Pride and Ego Down**: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW.
10. **Futility**: Invoking the feeling of futility of a detainee.
11. **We Know All**: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.
12. **Establish Your Identity**: Convincing the detainee that the interrogator has mistaken the detainee for someone else.
13. **Repetition Approach**: Continuously repeating the same question to the detainee within interrogation periods of normal duration.
14. **File and Dossier**: Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.
15. **Mutt and Jeff**: A team consisting of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique.

## Description of Interrogation Techniques (cont'd)

16. **Rapid Fire**: Questioning in rapid succession without allowing detainee to answer.

17. **Silence**: Staring at the detainee to encourage discomfort.

18. **Change of Scenery Up**: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

19. **Change of Scenery Down**: Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

20. **Hooding**: This technique is questioning the detainee with a blindfold in place. For interrogation purposes, the blindfold is not on other than during interrogation.

21. **Mild Physical Contact:** Lightly touching a detainee or lightly poking the detainee in a completely non-injurious manner. This also includes softly grabbing of shoulders to get the detainee's attention or to comfort the detainee.

22. **Dietary Manipulation:** Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

23. **Environmental Manipulation**: Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times.

24. **Sleep Adjustment:** Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

25. **False Flag**: Convincing the detainee that individuals from a country other than the United States are interrogating him.

26. **Threat of Transfer:** Threatening to transfer the subject to a 3rd country that subject is likely to fear would subject him to torture or death. (The threat would not be acted upon, nor would the threat include any information beyond the naming of the receiving country.)

# Description of Interrogation Techniques (cont'd)

27. **Isolation**: Isolating the detainee from other detainees while still complying with basic standards of treatment.

28. **Use of Prolonged Interrogations**: The continued use of a series of approaches that extend over a long period of time (e.g., 20 hours per day per interrogation).

29. **Forced Grooming**: Forcing a detainee to shave hair or beard. (Force applied with intention to avoid injury. Would not use force that would cause serious injury.)

30. **Prolonged Standing:** Lengthy standing in a "normal" position (non-stress). This has been successful, but should never make the detainee exhausted to the point of weakness or collapse. Not enforced by physical restraints. Not to exceed four hours in a 24-hour period.

31. **Sleep Deprivation**: Keeping the detainee awake for an extended period of time. (Allowing individual to rest briefly and then awakening him, repeatedly.) Not to exceed 4 days in succession.

32. **Physical Training**: Requiring detainees to exercise (perform ordinary physical exercises actions) (e.g., running, jumping jacks); not to exceed 15 minutes in a two hour period; not more than two cycles per 24 hour period. Assists in generating compliance and fatiguing the detainees. No enforced compliance.

33. **Face slap/ Stomach slap**: A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures and do not cause pain or injury. They are only effective if used once or twice together. After the second time on a detainee, it will lose the shock effect. Limited to two slaps per application; no more than two applications per interrogation.

34. **Removal of Clothing**: Potential removal of all clothing; removal to be done by military police if not agreed to by the subject. Creating a feeling of helplessness and dependence. This technique must be monitored to ensure the environmental conditions are such that this technique does not injure the detainee.

35. **Increasing Anxiety by Use of Aversions**: Introducing factors that of themselves create anxiety but do not create terror or mental trauma (e.g., simple presence of dog without directly threatening action). This technique requires the commander to develop specific and detailed safeguards to insure detainee's safety.

April 10, 2003

Messages from President George Bush and British Prime Minister Tony Blair

Translation of Arabic text of President Bush;s Message.

PRESIDENT BUSH: This is George W Bush, the President of the United States. At this moment, the regime of Saddam Hussein is being removed from power, and a long era of fear and cruelty is ending. American and coalition forces are now operating inside Baghdad – and we will not stop until Saddam's corrupt gang is gone. The government of Iraq, and the future of your country, will soon belong to you. The goals of our coalition are clear and limited. We will end a brutal regime, whose aggression and weapons of mass destruction make it a unique threat to the world. Coalition forces will help maintain law and order, so that Iraqis can live in security. We will respect your great religious traditions, whose principles of equality and compassion are essential to Iraq's future. We will help you build a peaceful and representative government that protects the rights of all citizens. And then our military forces will leave.Iraq will go forward as a unified, independent and sovereign nation that has regained a respected place in the world.

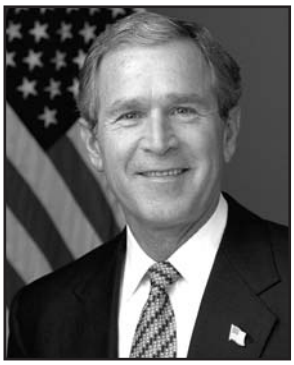
The United States and its coalition partners respect the people of Iraq. We are taking unprecedented measures to spare the lives of innocent Iraqi citizens, and are beginning to deliver food, water and medicine to those in need. Our only enemy is Saddam's brutal regime – and that regime is your enemy as well.

In the new era that is coming to Iraq, your country will no longer be held captive to the will of a cruel dictator. You will be free to build a better life, instead of building more palaces for Saddam and his sons, free to pursue economic prosperity without the hardship of economic sanctions, free to travel and speak your mind, free to join in the political affairs of Iraq. And all the people who make up your country – Kurds, Shi'a,

Turkomans, Sunnis, and others – will be free of the terrible persecution that so many have endured.

The nightmare that Saddam Hussein has brought to your nation will soon be over. You are a good and gifted people – the heirs of a great civilization that contributes to all humanity. You deserve better than tyranny and corruption and torture chambers. You deserve to live as free people. And I assure every citizen of Iraq: your nation will soon be free.

Thank you.



**الخطاب الذي قدمه جورج بوش الرئيس الأمريكي إلى تلفزيون " نحو الحرية "، العراق،**
**يوم الخميس الموافق ١٠ أبريل ٢٠٠٣**

## رسالة إلى الشعب العراقي من الرئيس الأمريكي جورج دبليو بوش

أنا جورج دبليو بوش، رئيس الولايات المتحدة الأمريكية. في هذه اللحظة يتم خلع صدام حسين ونظامه من السلطة، وهكذا ينتهي عصر من الخوف والقسوة دام لفترة طويلة. وإن القوات الأمريكية وقوات التحالف تعمل الآن داخل بغداد. ولن نتوقف حتى تذهب عصابة صدام الفاسدة. وسرعان ما سوف تكون حكومة العراق ومستقبل بلادكم بين أيديكم.

إن أهداف تحالفنا واضحة ومحددة. فسوف ننهي نظاماً وحشياً طالما كانت اعتداءاته وأسلحة الدمار الشامل التي يمتلكها خطراً شديداً على العالم. وسوف تقوم قوات التحالف بالمساعدة على حفظ الأمن وسيادة القانون حتى يستطيع العراقيون أن يعيشوا في أمان وأمن . وسوف نحترم تقاليدكم الدينية العريقة، التي تتحلى بالمساواة والمودة، وهي الأسس الرئيسية التي يرتكز عليها مستقبل العراق. وسوف نساعدكم على بناء حكومة مسالمة وممثله تحمي حقوق كل المواطنين. وعندئذ سوف تغادر قواتنا العسكرية. وسوف تتقدم العراق للأمام كدولة موحدة مستقلة لها سيادتها، حيث تستعيد مكانتها في العالم إذ تحظى باحترام وتقدير الجميع.

وإن الولايات المتحدة وشركائها في التحالف يقدرون ويحترمون شعب العراق. فإننا نتخذ إجراءات لم يسبق لها مثيل لحماية أرواح المواطنين العراقيين الأبرياء، كما أننا بدأنا في تزويد الطعام والمياه والأدوية لكل من هم في حاجة. فإن عدونا الوحيد هو نظام صدام الوحشي ــ وذلك النظام هو عدوكم أنتم أيضاً.

وسوف يبدأ عهد جديد في العراق لن تعود فيه بلادكم أسيرة لإرادة دكتاتوري قاسٍ. وسوف تكونوا أحراراً لبناء حياة أفضل بدلاً من بناء المزيد من قسوة صدام وأولاده، سوف تكونوا أحراراً لمتابعة الازدهار الاقتصادي دون مشقة عقوبات الاقتصادية، كما سوف تتمتعوا بحرية السفر وحرية التعبير عن آرائكم حسبما تريدون وحرية الإنخراط في الشئون السياسية للعراق. كما أن كل مواطني بلادكم من أكراد وشيعة وتركمان وسنيين وغيرهم سوف يتحرروا من الاضطهاد الرهيب الذي طالما عانى منه الكثيرون.

فقد أوشك الكابوس الذي جلبه صدام حسين أن ينزاح عن بلادكم. فأنتم شعب طيب موهوب، وأنتم أبناء بل ورثة الحضارة العظيمة التي طالما ساهمت نحو الإنسانية جمعاء. وتستحقون أفضل بكثير من أن يحكمكم طاغية وما يحيط به من فساد وما يستخدمه من غرف التعذيب. إنكم تستحقون أن تعيشوا أحراراً. وإنني أؤكد لكل مواطن عراقي أن بلادكم سوف تصبح حرة أبية قريباً.

أشكركم

**سوف يتم بث هذه الرسائل عبر خدمة التحالف التلفزيونية "نحو الحرية"**
**التي يمكنكم استقبالها على القناة الثالثة في العراق. فراقبوها.**



**الخطاب الذي أدلى به توني بلير رئيس الوزراء إلى تلفزيون "نحو الحرية" ، العراق،**
**يوم الخميس الموافق ١٠ أبريل ٢٠٠٣**

**رسالة إلى الشعب العراقي من رئيس الوزراء توني بلير**

يسرني أن أتمكن من التحدث إليكم اليوم، وأن أخبركم أن نظام صدام حسين ينهار وأن سنوات الوحشية والقمع والخوف قد وصلت إلى نهايتها، وأن مستقبلاً جديداً أفضل يطل في الأفق كمنارة لشعب العراق.

إننا لم نرغب أن نخوض هذه الحرب. ولكن رفض صدام تسليم أسلحة الدمار الشامل لم يتح لنا أي خيار سوى أن نفعل ذلك. والآن بدأت الحرب وسوف تستمر حتى النهاية. وسوف نستمر في عمل كل ما في استطاعتنا لتجنب الخسائر في المدنيين. إن عدونا هو صدام ونظامه وليس الشعب العراقي. كما أن قواتنا هم أصدقاء ومحررون للشعب العراقي وليسوا غزاة. ولن يبقوا يوماً أزيد من الضروري.

إنني أدرك أن بعض منكم متخوف من تكرار ما حدث عام ١٩٩٠، عندما اعتقدتم أن حكم صدام وصل إلى نهايته، ولكنه ظل باقياً وعانيتم. لن يحدث ذلك هذه المرة. فسوف يذهب هذا النظام، عندئذ سوف نعمل معكم لبناء عراقٍ آمنة مزدهرة كما تريدونها وتستحقونها. ولن تقوم بريطانيا أو الولايات المتحدة الأمريكية أو الأمم المتحدة بإدارة العراق الجديدة ولكن سوف تقوموا أنتم شعب العراق بإدارتها.

هدفنا هو المساعدة في تجنب المعاناة الإنسانية الواقعة وأن ننتقل بأسرع وقت ممكن إلى سلطة مؤقتة. يدير زمامها العراقيون. وسوف تمهد الطريق لحكومة عراقية ممثلة فعلاً حيث تمثل حقوق الإنسان وسيادة القانون ولن تصرف ثروة العراق على قصور أو أسلحة الدمار الشامل، ولكن تصرف هذه الثروة عليكم أنتم وعلى الخدمات التي تحتاجون إليها. لقد بدد صدام حسين ونظامه ثروة بلادكم بينما يعيش الكثيرون منكم في فقر ، عاشوا هم حياة البذخ. لقد أصبح هو من أغنى أغنياء العالم بعد أن سرق ونهب أموالكم أي أموال الشعب العراقي.

إن عائدات النفط العراقي سوف تكون لكم لتستخدم لبناء مستقبل مزدهر لأجلكم ولأجل أبنائكم .

إنني أدرك أيضاً من خلال لقاءاتي مع العراقيين المنفيين والمبعدين الذين يعيشون في بريطانيا أنكم أنتم شعب مُبدع خلاق. ويجب أن تتمتعوا بحرية التحرك وحرية التوصل إلى وسائل الإعلام المستقلة وحرية التعبير عن آرائكم وتنمية ثقافتكم وحضارتكم .

ومن خلال تجربتي مع شعوب العالم أرى أننا كلنا نريد أن نعيش حياتنا في سلام وأمان، إننا كلنا نريد أن نتيح لعائلاتنا الفرصة لحياة كريمة. فلسنوات طويلة تم حرمانكم من تلك الفرصة. فقد اضطر ملايين من أبناء شعبكم من رجال وسيدات أن يتركوا البلاد. إذ قام هذا النظام بقتل وتعذيب الآلاف المؤلفة من العراقيين والتنكيل بهم.

إننا نريد أن نتيح لكم الفرصة لإعادة بناء حياتكم، لإعطاء أسركم فرصة لمستقبل أفضل. هذه هي روح الصداقة وحسن النوايا التي نقدم بها مساعدتنا الآن.

**April 16, 2003**

**MEMORANDUM FOR THE COMMANDER, US SOUTHERN COMMAND**

**SUBJECT: Counter-Resistance Techniques in the War on Terrorism**

**From: Secretary of Defense, Donald Rumsfeld**

~~UNCLASSIFIED~~
~~SECRET//NOFORN~~

THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

APR 16 2003

MEMORANDUM FOR THE COMMANDER, US SOUTHERN COMMAND

SUBJECT: Counter-Resistance Techniques in the War on Terrorism (S)

(U) ~~(S/NF)~~ I have considered the report of the Working Group that I directed be established on January 15, 2003.

(U) ~~(S/NF)~~ I approve the use of specified counter-resistance techniques, subject to the following:

(U) a. The techniques I authorize are those lettered A-X, set out at Tab A.

(U) b. These techniques must be used with all the safeguards described at Tab B.

(U) ~~(S)~~ c. Use of these techniques is limited to interrogations of unlawful combatants held at Guantanamo Bay, Cuba.

(U) ~~(S)~~ d. Prior to the use of these techniques, the Chairman of the Working Group on Detainee Interrogations in the Global War on Terrorism must brief you and your staff.

(U) ~~(S/NF)~~ I reiterate that US Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions. In addition, if you intend to use techniques B, I, O, or X, you must specifically determine that military necessity requires its use and notify me in advance.

(U) ~~(S/NF)~~ If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.

(U) ~~(S)~~ Nothing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees.

Attachments:
As stated

Classified Under Authority of Executive Order 12958
Executive Secretary, Office of the Secretary of Defense
William P. Marriott, CAPT, USN
June 18, 2004

NOT Rreleasable TO
FOREIGN NATIONALS

~~UNCLASSIFIED~~
~~SECRET//NOFORN~~

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013

TAB A

## INTERROGATION TECHNIQUES

(U) ~~(S//NF)~~ The use of techniques A - X is subject to the general safeguards as provided below as well as specific implementation guidelines to be provided by the appropriate authority. Specific implementation guidance with respect to techniques A - Q is provided in Army Field Manual 34-52. Further implementation guidance with respect to techniques R - X will need to be developed by the appropriate authority.

(U) ~~(S//NF)~~ Of the techniques set forth below, the policy aspects of certain techniques should be considered to the extent those policy aspects reflect the views of other major U.S. partner nations. Where applicable, the description of the technique is annotated to include a summary of the policy issues that should be considered before application of the technique.

A. (U) ~~(S//NF)~~ Direct: Asking straightforward questions.

B. (U) ~~(S//NF)~~ Incentive/Removal of Incentive: Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees. [Caution: Other nations that believe that detainees are entitled to POW protections may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34). Although the provisions of the Geneva Convention are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

C. (U) ~~(S//NF)~~ Emotional Love: Playing on the love a detainee has for an individual or group.

D. (U) ~~(S//NF)~~ Emotional Hate: Playing on the hatred a detainee has for an individual or group.

E. (U) ~~(S//NF)~~ Fear Up Harsh: Significantly increasing the fear level in a detainee.

F. (U) ~~(S//NF)~~ Fear Up Mild: Moderately increasing the fear level in a detainee.

G. (U) ~~(S//NF)~~ Reduced Fear: Reducing the fear level in a detainee.

H. (U) ~~(S//NF)~~ Pride and Ego Up: Boosting the ego of a detainee.

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Reason: 1.5(a)
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I. (U) ~~(S//NF)~~ Pride and Ego Down: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW. [Caution: Article 17 of Geneva III provides, "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." Other nations that believe that detainees are entitled to POW protections may consider this technique inconsistent with the provisions of Geneva. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

J. (U) ~~(S//NF)~~ Futility: Invoking the feeling of futility of a detainee.

K. (U) ~~(S//NF)~~ We Know All: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

L. (U) ~~(S//NF)~~ Establish Your Identity: Convincing the detainee that the interrogator has mistaken the detainee for someone else.

M. (U) ~~(S//NF)~~ Repetition Approach: Continuously repeating the same question to the detainee within interrogation periods of normal duration.

N. (U) ~~(S//NF)~~ File and Dossier: Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.

O. (U) ~~(S//NF)~~ Mutt and Jeff: A team consisting of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique. [Caution: Other nations that believe that POW protections apply to detainees may view this technique as inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

P. (U) ~~(S//NF)~~ Rapid Fire: Questioning in rapid succession without allowing detainee to answer.

Q. (U) ~~(S//NF)~~ Silence: Staring at the detainee to encourage discomfort.

R. (U) ~~(S//NF)~~ Change of Scenery Up: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

S. (U) ~~(S//NF)~~ Change of Scenery Down: Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

T. (U) ~~(S//NF)~~ Dietary Manipulation: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

(U)
U. (~~S//NF~~) Environmental Manipulation: Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times. [Caution: Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane. Consideration of these views should be given prior to use of this technique.]

(U)
V. (~~S//NF~~) Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

(U)
W. (~~S//NF~~) False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him.

(U)
X. (~~S//NF~~) Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment. [Caution: The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command. This technique is not known to have been generally used for interrogation purposes for longer than 30 days. Those nations that believe detainees are subject to POW protections may view use of this technique as inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion and Article 126 which ensures access and basic standards of treatment. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

TAB B

**GENERAL SAFEGUARDS**

(U) ~~(S//NF)~~ Application of these interrogation techniques is subject to the following general safeguards: (i) limited to use only at strategic interrogation facilities; (ii) there is a good basis to believe that the detainee possesses critical intelligence; (iii) the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); (iv) interrogators are specifically trained for the technique(s); (v) a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) has been developed; (vi) there is appropriate supervision; and, (vii) there is appropriate specified senior approval for use with any specific detainee (after considering the foregoing and receiving legal advice).

(U) The purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators. Operating instructions must be developed based on command policies to insure uniform, careful, and safe application of any interrogations of detainees.

(U) ~~(S//NF)~~ Interrogations must always be planned, deliberate actions that take into account numerous, often interlocking factors such as a detainee's current and past performance in both detention and interrogation, a detainee's emotional and physical strengths and weaknesses, an assessment of possible approaches that may work on a certain detainee in an effort to gain the trust of the detainee, strengths and weaknesses of interrogators, and augmentation by other personnel for a certain detainee based on other factors.

(U) ~~(S//NF)~~ Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals. The policies established by the detaining units that pertain to searching, silencing, and segregating also play a role in the interrogation of a detainee. Detainee interrogation involves developing a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration of interrogation techniques and oversight is essential.

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Reason: 1.5(a)
Declassify On: 2 April 2013

(U) ~~(S//NF)~~ It is important that interrogators be provided reasonable latitude to vary techniques depending on the detainee's culture, strengths, weaknesses, environment, extent of training in resistance techniques as well as the urgency of obtaining information that the detainee is known to have.

(U) ~~(S//NF)~~ While techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques to be employed must be considered before any decisions are made regarding approval for particular situations. The title of a particular technique is not always fully descriptive of a particular technique. With respect to the employment of any techniques involving physical contact, stress or that could produce physical pain or harm, a detailed explanation of that technique must be provided to the decision authority prior to any decision.

Time permitting, each interrogator should unobtrusively observe the source to personally confirm his identity and to check his personal appearance and behavior.

After the interrogator has collected all information available about his assigned source, he analyzes it. He looks for indicators of psychological or physical weakness that might make the source susceptible to one or more approaches, which facilitates his approach strategy. He also uses the information he collected to identify the type and level of knowledge possessed by the source pertinent to the element's collection mission.

The interrogator uses his estimate of the type and extent of knowledge possessed by the source to modify the basic topical sequence of questioning. He selects only those topics in which he believes the source has pertinent knowledge. In this way, the interrogator refines his element's overall objective into a set of specific interrogation subjects.

The major topics that can be covered in an interrogation are shown below in their normal sequence. However, the interrogator is free to modify this sequence as necessary.

- Missions.
- Composition.
- Weapons, equipment, strength.
- Dispositions.
- Tactics.
- Training.
- Combat effectiveness.
- Logistics.
- Electronic technical data.
- Miscellaneous.

As a result of the planning and preparation phase, the interrogator develops a plan for conducting his assigned interrogation. He must review this plan with the senior interrogator, when possible. Whether written or oral, the interrogation plan must contain at least the following items:

- Interrogation objective.
- EPW's or detainee's identity, to include visual observation of the EPW or detainee by the interrogator.
- Interrogation time and place.
- Primary and alternate approaches.
- Questioning techniques to be used or why the interrogator selected only specific topics from the basic questioning sequence.
- Means of recording and reporting information obtained.

The senior interrogator reviews each plan and makes any changes he feels necessary based on the commander's PIR and IR. After the plan is approved, the holding compound is notified when to bring the source to the interrogation site. The interrogator collects all available interrogation aids needed (maps, charts, writing tools, and reference materials) and proceeds to the interrogation site.

## APPROACH PHASE

The approach phase begins with initial contact between the EPW or detainee and interrogator. Extreme care is required since the success of the interrogation hinges, to a large degree, on the early development of the EPW's or detainee's willingness to communicate. The interrogator's objective during this phase is to establish EPW or detainee rapport, and to gain his willing cooperation so he will correctly answer pertinent questions to follow. The interrogator—

- Adopts an appropriate attitude based on EPW or detainee appraisal.
- Prepares for an attitude change, if necessary.
- Begins to use an approach technique.

The amount of time spent on this phase will mostly depend on the probable quantity and value of information the EPW or detainee possesses, the availability of other EPW or detainee with knowledge on the same topics, and available time. At the initial contact, a businesslike relationship should be maintained. As the EPW or detainee assumes a cooperative attitude, a more relaxed atmosphere may be advantageous. The interrogator must carefully determine which of the various approach techniques to employ.

Regardless of the type of EPW or detainee and his outward personality, he does possess weaknesses which,

if recognized by the interrogator, can be exploited. These weaknesses are manifested in personality traits such as speech, mannerisms, facial expressions, physical movements, excessive perspiration, and other overt indications that vary from EPW or detainee.

From a psychological standpoint, the interrogator must be cognizant of the following behaviors. People tend to—

- Talk, especially after harrowing experiences.
- Show deference when confronted by superior authority.
- Rationalize acts about which they feel guilty.
- Fail to apply or remember lessons they may have been taught regarding security if confronted with a disorganized or strange situation.
- Cooperate with those who have control over them.
- Attach less importance to a topic about which the interrogator demonstrates identical or related experience or knowledge.
- Appreciate flattery and exoneration from guilt.
- Resent having someone or something they respect belittled, especially by someone they dislike.
- Respond to kindness and understanding during trying circumstances.
- Cooperate readily when given material rewards such as extra food or luxury items for their personal comfort.

Interrogators do not "run" an approach by following a pattern or routine. Each interrogation is different, but all interrogation approaches have the following in common. They—

- Establish and maintain control over the source and interrogation.
- Establish and maintain rapport between the interrogator and source.
- Manipulate the source's emotions and weaknesses to gain his willing cooperation.

The successful application of approach techniques eventually induces the source to willingly provide accurate intelligence information to the interrogator. The term "willingly" refers to the source's answering the interrogator's questions, not necessarily his cooperation.

The source may or may not be aware he is providing the interrogator with information about enemy forces. Some approaches may be complete when the source begins to answer questions. Others may have to be constantly maintained or reinforced throughout the interrogation.

The techniques used in an approach can best be defined as a series of events, not just verbal conversation between the interrogator and the source. The exploitation of the source's emotion can be harsh or gentle in application. Some useful techniques used by interrogators are—

- Hand and body movements.
- Actual physical contact such as a hand on the shoulder for reassurance.
- Silence.

## RAPPORT POSTURES

There are two types of rapport postures determined during planning and preparation: stern and sympathetic.

In the stern posture, the interrogator keeps the EPW or detainee at attention. The aim is to make the EPW or detainee keenly aware of his helpless and inferior status. Interrogators use this posture with officers, NCOs, and security-conscious enlisted men.

In the sympathetic posture, the interrogator addresses the EPW or detainee in a friendly fashion, striving to put him at ease. This posture is commonly used in interrogating older or younger EPWs. EPWs may be frightened and confused. One variation of this posture is when the interrogator asks about the EPW's family. Few EPWs will hesitate to discuss their family.

Frightened persons, regardless of rank, will invariably talk in order to relieve tension once they hear a sympathetic voice in their own tongue. To put the EPW at ease, the interrogator may allow the EPW to sit down, offer a cigarette, ask whether or not he needs medical care, and otherwise show interest in his case.

There are many variations of these basic postures. Regardless of the one used, the interrogator must present a military appearance and show character and energy. The interrogator must control his temper at all times, except when a display is planned. The inter-

rogator must not waste time in pointless discussions or make promises he cannot keep; for example, the interrogator's granting political asylum.

When making promises in an effort to establish rapport, great care must be taken to prevent implying that rights guaranteed the EPW under international and US law will be withheld if the EPW refuses to cooperate.

Under no circumstances will the interrogator betray surprise at anything the EPW might say. Many EPWs will talk freely if they feel the information they are discussing is already known to the interrogator. If the interrogator acts surprised, the EPW may stop talking immediately.

The interrogator encourages any behavior that deepens rapport and increases the flow of communication. At the same time, the interrogator must discourage any behavior that has the opposite effect.

The interrogator must always be in control of the interrogation. If the EPW or detainee challenges this control, the interrogator must act quickly and firmly. Everything the interrogator says and does must be within the limits of the GPW, Article 17.

## DEVELOPING RAPPORT

Rapport must be maintained throughout the interrogation, not only in the approach phase. If the interrogator has established good rapport initially and then abandons the effort, the source would rightfully assume the interrogator cares less and less about him as the information is being obtained. If this occurs, rapport is lost and the source may cease answering questions. Rapport may be developed by—

- Asking about the circumstances of capture. By doing this, the interrogator can gain insight into the prisoner's actual state of mind and, more importantly, he can ascertain his possible breaking points.
- Asking background questions. After asking about the source's circumstances of capture, apparent interest can be built by asking about the source's family, civilian life, friends, likes, and dislikes. This is to develop rapport, but nonpertinent questions may open new avenues for the approach and help determine whether tentative approaches chosen in the planning and preparation phase will be effective. If these questions show that the tentative approaches chosen will not be effective, a flexible interrogator can shift the approach direction without the source being aware of the change.

Depending on the situation, and requests the source may have made, the interrogator also can use the following to develop rapport.

- Offer realistic incentives, such as—
  - —Immediate comfort items (coffee, cigarettes).
  - —Short-term (a meal, shower, send a letter home).
  - —Long-term (repatriation, political asylum).
- Feign experience similar to those of the source.
- Show concern for the source through the use of voice vitality and body language.
- Help the source to rationalize his guilt.
- Show kindness and understanding toward the source's predicament.
- Exonerate the source from guilt.
- Flatter the source.

After having established control and rapport, the interrogator continually assesses the source to see if the approaches—and later the questioning techniques—chosen in the planning and preparation phase will indeed work.

Approaches chosen in planning and preparation are tentative and based on the sometimes scanty information available from documents, guards, and personal observation. This may lead the interrogator to select approaches which may be totally incorrect for obtaining this source's willing cooperation. Thus, careful assessment of the source is critical to avoid wasting valuable time in the approach phase.

The questions can be mixed or separate. If, for example, the interrogator has tentatively chosen a "love of comrades" approach, he should ask the source questions like "How did you get along with your fellow squad members?" If the source answers they were all very close and worked well as a team, the interrogator can use this approach and be reasonably sure of its success.

However, if the source answers, "They all hated my guts and I couldn't stand any of them," the interrogator should abandon that approach and ask some quick, nonpertinent questions to give himself time to work out a new approach.

### Smooth Transitions

The interrogator must guide the conversation smoothly and logically, especially if he needs to move from one approach technique to another. "Poking and hoping" in the approach may alert the prisoner to ploys and will make the job more difficult.

Tie-ins to another approach can be made logically and smoothly by using transitional phrases. Logical tie-ins can be made by including simple sentences which connect the previously used approach with the basis for the next one.

Transitions can also be smoothly covered by leaving the unsuccessful approach and going back to nonpertinent questions. By using nonpertinent conversation, the interrogator can move the conversation in the desired direction and, as previously stated, sometimes can obtain leads and hints about the source's stresses or weaknesses or other approach strategies that may be more successful.

### Sincere and Convincing

If an interrogator is using argument and reason to get the source to cooperate, he must be convincing and appear sincere. All inferences of promises, situations, and arguments, or other invented material must be believable. What a source may or may not believe depends on the interrogator's knowledge, experience, and training. A good source assessment is the basis for the approach and vital to the success of the interrogation effort.

### Recognize the Breaking Point

Every source has a breaking point, but an interrogator never knows what it is until it has been reached. There are, however, some good indicators the source is near his breaking point or has already reached it. For example, if during the approach, the source leans forward with his facial expression indicating an interest in the proposal or is more hesitant in his argument, he is probably nearing the breaking point. The interrogator must be alert to recognize these signs.

Once the interrogator determines the source is breaking, he should interject a question pertinent to the objective of the interrogation. If the source answers it, the interrogator can move into the questioning phase. If the source does not answer or balks at answering it, the interrogator must realize the source was not as close to the breaking point as thought. In this case, the interrogator must continue with his approach, or switch to an alternate approach or questioning technique and continue to work until he feels the source is near breaking.

The interrogator can tell if the source has broken only by interjecting pertinent questions. This process must be followed until the EPW or detainee begins to answer pertinent questions. It is possible the EPW or detainee may cooperate for a while and then balk at answering further questions. If this occurs, the interrogator can reinforce the approaches that initially gained the source's cooperation or move into a different approach before returning to the questioning phase.

At this point, it is important to note the amount of time spent with a particular source depends on several factors:

- The battlefield situation.
- Expediency which the supported commander's PIR and IR requirements need to be answered.
- Source's willingness to talk.

The number of approaches used is limited only by the interrogator's skill. Almost any ruse or deception is usable as long as the provisions of the GPW, as outlined in Figure 1-4, are not violated.

An interrogator must not pass himself off as a medic, chaplain, or as a member of the Red Cross (Red Crescent or Red Lion). To every approach technique, there are literally hundreds of possible variations, each of which can be developed for a specific situation or source. The variations are limited only by the interrogator's personality, experience, ingenuity, and imagination.

## APPROACH COMBINATIONS

With the exception of the direct approach, no other approach is effective by itself. Interrogators use different approach techniques or combine them into a cohesive, logical technique. Smooth transitions, sincerity, logic, and conviction almost always make a strategy work. The lack of will undoubtedly dooms it to failure. Some examples of combinations are—

- Direct—futility—incentive.
- Direct—futility—love of comrades.
- Direct—fear-up (mild)—incentive.

The number of combinations are unlimited. Interrogators must carefully choose the approach strategy in the planning and preparation phase and listen carefully

to what the source is saying (verbally or nonverbally) for leads the strategy chosen will not work. When this occurs, the interrogator must adapt to approaches he believes will work in gaining the source's cooperation.

The approach techniques are not new nor are all the possible or acceptable techniques discussed below. Everything the interrogator says and does must be in concert with the GWS, GPW, GC, and UCMJ. The approaches which have proven effective are—

- Direct.
- Incentive.
- Emotional.
- Increased fear-up.
- Pride and ego.

### Direct Approach

The interrogator asks questions directly related to information sought, making no effort to conceal the interrogation's purpose. The direct approach, always the first to be attempted, is used on EPWs or detainees who the interrogator believes will cooperate.

This may occur when interrogating an EPW or detainee who has proven cooperative during initial screening or first interrogation. It may also be used on those with little or no security training. The direct approach works best on lower enlisted personnel, as they have little or no resistance training and have had minimal security training.

The direct approach is simple to use, and it is possible to obtain the maximum amount of information in the minimum amount of time. It is frequently employed at lower echelons when the tactical situation precludes selecting other techniques, and where the EPW's or detainee's mental state is one of confusion or extreme shock. Figure C-3 contains sample questions used in direct questioning.

The direct approach is the most effective. Statistics show in World War II, it was 90 percent effective. In Vietnam and OPERATIONS URGENT FURY, JUST CAUSE, and DESERT STORM, it was 95 percent effective.

### Incentive Approach

The incentive approach is based on the application of inferred discomfort upon an EPW or detainee who lacks willpower. The EPW or detainee may display fondness for certain luxury items such as candy, fruit, or cigarettes. This fondness provides the interrogator with a positive means of rewarding the EPW or detainee for cooperation and truthfulness, as he may give or withhold such comfort items at his discretion. Caution must be used when employing this technique because—

- Any pressure applied in this manner must not amount to a denial of basic human needs under any circumstances. [NOTE: Interrogators may not withhold a source's rights under the GPW, but they can withhold a source's privileges.] Granting incentives must not infringe on these rights, but they can be things to which the source is already entitled. This can be effective only if the source is unaware of his rights or privileges.
- The EPW or detainee might be tempted to provide false or inaccurate information to gain the desired luxury item or to stop the interrogation.

The GPW, Article 41, requires the posting of the convention contents in the EPW's own language. This is an MP responsibility.

Incentives must seem to be logical and possible. An interrogator must not promise anything that cannot be delivered. Interrogators do not make promises, but usually infer them while sidestepping guarantees.

For example, if an interrogator made a promise he could not keep and he or another interrogator had to talk with the source again, the source would not have any trust and would probably not cooperate. Instead of clearly promising a certain thing, such as political asylum, an interrogator will offer to do what he can to help achieve the source's desired goal; as long as the source cooperates.

As with developing rapport, the incentive approach can be broken down into two incentives. The determination rests on when the source expects to receive the incentive offered.

- Short term—received immediately; for example, letter home, seeing wounded buddies.
- Long term—received within a period of time; for example, political asylum.

### Emotional Approach

Through EPW or detainee observation, the interrogator can often identify dominant emotions which motivate. The motivating emotion may be greed, love, hate, revenge, or others. The interrogator employs ver-

bal and emotional ruses in applying pressure to the EPW's or detainee's dominant emotions.

One major advantage of this technique is it is versatile and allows the interrogator to use the same basic situation positively and negatively.

For example, this technique can be used on the EPW who has a great love for his unit and fellow soldiers. The interrogator may take advantage of this by telling the EPW that by providing pertinent information, he may shorten the war or battle in progress and save many of his comrades' lives, but his refusal to talk may cause their deaths. This places the burden on the EPW or detainee and may motivate him to seek relief through cooperation.

Conversely, this technique can also be used on the EPW or detainee who hates his unit because it withdrew and left him to be captured, or who feels he was unfairly treated in his unit. In such cases, the interrogator can point out that if the EPW cooperates and specifies the unit's location, the unit can be destroyed, thus giving the EPW an opportunity for revenge. The interrogator proceeds with this method in a very formal manner.

This approach is likely to be effective with the immature and timid EPW.

Emotional Love Approach. For the emotional love approach to be successful, the interrogator must focus on the anxiety felt by the source about the circumstances in which he finds himself. The interrogator must direct the love the source feels toward the appropriate object: family, homeland, or comrades. If the interrogator can show the source what the source himself can do to alter or improve his situation, the approach has a chance of success.

This approach usually involves some incentive such as communication with the source's family or a quicker end to the war to save his comrades' lives. A good interrogator will usually orchestrate some futility with an emotional love approach to hasten the source's reaching the breaking point.

Sincerity and conviction are critical in a successful attempt at an emotional love approach as the interrogator must show genuine concern for the source, and for the object at which the interrogator is directing the source's emotion.

If the interrogator ascertains the source has great love for his unit and fellow soldiers, the interrogator can effectively exploit the situation. This places a burden on the source and may motivate him to seek relief through cooperation with the interrogator.

Emotional Hate Approach. The emotional hate approach focuses on any genuine hate, or possibly a desire for revenge, the source may feel. The interrogator must ascertain exactly what it is the source may hate so the emotion can be exploited to override the source's rational side. The source may have negative feelings about his country's regime, immediate superiors, officers in general, or fellow soldiers.

This approach is usually most effective on members of racial or religious minorities who have suffered discrimination in military and civilian life. If a source feels he has been treated unfairly in his unit, the interrogator can point out that, if the source cooperates and divulges the location of that unit, the unit can be destroyed, thus affording the source revenge.

By using a conspiratorial tone of voice, the interrogator can enhance the value of this technique. Phrases, such as "You owe them no loyalty for the way they treated you," when used appropriately, can expedite the success of this technique.

Do not immediately begin to berate a certain facet of the source's background or life until your assessment indicates the source feels a negative emotion toward it.

The emotional hate approach can be used more effectively by drawing out the source's negative emotions with questions that elicit a thought-provoking response. For example, "Why do you think they allowed you to be captured?" or "Why do you think they left you to die?" Do not berate the source's forces or homeland unless certain negative emotions surface.

Many sources may have great love for their country, but may hate the regime in control. The emotional hate approach is most effective with the immature or timid source who may have no opportunity up to this point for revenge, or never had the courage to voice his feelings.

### Fear-Up Approach

The fear-up approach is the exploitation of a source's preexisting fear during the period of capture and interrogation. The approach works best with young, inexperienced sources, or sources who exhibit a greater than normal amount of fear or nervousness. A source's fear may be justified or unjustified. For example, a source who has committed a war crime may justifiably fear

prosecution and punishment. By contrast, a source who has been indoctrinated by enemy propaganda may unjustifiably fear that he will suffer torture or death in our hands if captured.

This approach has the greatest potential to violate the law of war. Great care must be taken to avoid threatening or coercing a source which is in violation of the GPW, Article 17.

It is critical the interrogator distinguish what the source fears in order to exploit that fear. The way in which the interrogator exploits the source's fear depends on whether the source's fear is justified or unjustified.

Fear-Up (Harsh). In this approach, the interrogator behaves in an overpowering manner with a loud and threatening voice. The interrogator may even feel the need to throw objects across the room to heighten the source's implanted feelings of fear. Great care must be taken when doing this so any actions would not violate the prohibition on coercion and threats contained in the GPW, Article 17.

This technique is to convince the source he does indeed have something to fear; that he has no option but to cooperate. A good interrogator will implant in the source's mind that the interrogator himself is not the object to be feared, but is a possible way out of the trap.

Use the confirmation of fear only on sources whose fear is justified. During this approach, confirm to the source that he does indeed have a legitimate fear. Then convince the source that you are the source's best or only hope in avoiding or mitigating the object of his fear, such as punishment for his crimes.

You must take great care to avoid promising actions that are not in your power to grant. For example, if the source has committed a war crime, inform the source that the crime has been reported to the appropriate authorities and that action is pending. Next inform the source that, if he cooperates and tells the truth, you will report that he cooperated and told the truth to the appropriate authorities. You may add that you will also report his lack of cooperation. You may not promise that the charges against him will be dismissed because you have no authority to dismiss the charges.

Fear-Up (Mild). This approach is better suited to the strong, confident type of interrogator; there is generally no need to raise the voice or resort to heavy-handed, table-banging.

For example, capture may be a result of coincidence—the soldier was caught on the wrong side of the border before hostilities actually commenced (he was armed, he could be a terrorist)—or as a result of his actions (he surrendered contrary to his military oath and is now a traitor to his country, and his forces will take care of the disciplinary action).

The fear-up (mild) approach must be credible. It usually involves some logical incentive.

In most cases, a loud voice is not necessary. The actual fear is increased by helping the source realize the unpleasant consequences the facts may cause and by presenting an alternative, which, of course, can be brought about by answering some simple questions.

The fear-up (harsh) approach is usually a dead end, and a wise interrogator may want to keep it in reserve as a trump card. After working to increase the source's fear, it would be difficult to convince him everything will be all right if the approach is not successful.

### Fear-Down Approach

This technique is nothing more than calming the source and convincing him he will be properly and humanely treated, or telling him the war for him is mercifully over and he need not go into combat again. When used with a soothing, calm tone of voice, this often creates rapport and usually nothing else is needed to get the source to cooperate.

While calming the source, it is a good idea to stay initially with nonpertinent conversation and to avoid the subject which has caused the source's fear. This works quickly in developing rapport and communication, as the source will readily respond to kindness.

When using this approach, it is important the interrogator relate to the source at his perspective level and not expect the source to come up to the interrogator's level.

If the EPW or detainee is so frightened he has withdrawn into a shell or regressed to a less threatening state of mind, the interrogator must break through to him. The interrogator can do this by putting himself on the same physical level as the source; this may require some physical contact. As the source relaxes and begins to respond to kindness, the interrogator can begin asking pertinent questions.

This approach technique may backfire if allowed to go too far. After convincing the source he has nothing

to fear, he may cease to be afraid and may feel secure enough to resist the interrogator's pertinent question. If this occurs, reverting to a harsher approach technique usually will bring the desired result quickly.

The fear-down approach works best if the source's fear is unjustified. During this approach, take specific actions to reduce the source's unjustified fear. For example, if the source believes that he will be abused while in your custody, make extra efforts to ensure that the source is well cared for, fed, and appropriately treated.

Once the source is convinced that he has no legitimate reason to fear you, he will be more inclined to cooperate. The interrogator is under no duty to reduce a source's unjustified fear. The only prohibition is that the interrogator may not say or do anything that directly or indirectly communicates to the source that he will be harmed unless he provides the requested information.

These applications of the fear approach may be combined to achieve the desired effect. For example, if a source has justified and unjustified fears, you may initially reduce the source's unfounded fears, then confirm his legitimate fears. Again, the source should be convinced the interrogator is his best or only hope in avoiding or mitigating the object of his fear.

### Pride and Ego Approach

The strategy of this approach is to trick the source into revealing desired information by goading or flattering him. It is effective with sources who have displayed weakness or feelings of inferiority. A real or imaginary deficiency voiced about the source, loyalty to his organization, or any other feature can provide a basis for this technique.

The interrogator accuses the source of weakness or implies he is unable to do a certain thing. This type of source is also prone to excuses and reasons why he did or did not do a certain thing, often shifting the blame to others. An example is opening the interrogation with the question, "Why did you surrender so easily when you could have escaped by crossing the nearby ford in the river?"

The source is likely to provide a basis for further questions or to reveal significant intelligence information if he attempts to explain his surrender in order to vindicate himself. He may give an answer such as, "No one could cross the ford because it is mined."

This technique can also be employed in another manner--by flattering the source into admitting certain information in order to gain credit. For example, while interrogating a suspected saboteur, the interrogator states: "This was a smooth operation. I have seen many previous attempts fail. I bet you planned this. Who else but a clever person like you would have planned it? When did you first decide to do the job?"

This technique is especially effective with the source who has been looked down upon by his superiors. The source has the opportunity to show someone he is intelligent.

A problem with the pride and ego approach is it relies on trickery. The source will eventually realize he has been tricked and may refuse to cooperate further. If this occurs, the interrogator can easily move into a fear-up approach and convince the source the questions he has already answered have committed him, and it would be useless to resist further.

The interrogator can mention it will be reported to the source's forces that he has cooperated fully with the enemy, will be considered a traitor, and has much to fear if he is returned to his forces.

This may even offer the interrogator the option to go into a love-of-family approach where the source must protect his family by preventing his forces from learning of his duplicity or collaboration. Telling the source you will not report that he talked or that he was a severe discipline problem is an incentive that may enhance the effectiveness of the approach.

Pride and Ego-Up Approach. This approach is most effective on sources with little or no intelligence, or on those who have been looked down upon for a long time. It is very effective on low-ranking enlisted personnel and junior grade officers, as it allows the source to finally show someone he does indeed have some "brains."

The source is constantly flattered into providing certain information in order to gain credit. The interrogator must take care to use a flattering somewhat-in-awe tone of voice, and speak highly of the source throughout this approach. This quickly produces positive feelings on the source's part, as he has probably been looking for this type of recognition all of his life.

The interrogator may blow things out of proportion using items from the source's background and making them seem noteworthy or important. As everyone is eager to hear praise, the source will eventually reveal

pertinent information to solicit more laudatory comments from the interrogator.

Effective targets for a successful pride and ego-up approach are usually the socially accepted reasons for flattery, such as appearance and good military bearing. The interrogator should closely watch the source's demeanor for indications the approach is working. Some indications to look for are—

- Raising of the head.
- A look of pride in the eyes.
- Swelling of the chest.
- Stiffening of the back.

Pride and Ego-Down Approach. This approach is based on attacking the source's sense of personal worth. Any source who shows any real or imagined inferiority or weakness about himself, loyalty to his organization, or captured under embarrassing circumstances, can be easily broken with this approach technique.

The objective is for the interrogator to pounce on the source's sense of pride by attacking his loyalty, intelligence, abilities, leadership qualities, slovenly appearance, or any other perceived weakness. This will usually goad the source into becoming defensive, and he will try to convince the interrogator he is wrong. In his attempt to redeem his pride, the source will usually involuntarily provide pertinent information in attempting to vindicate himself.

A source susceptible to this approach is also prone to make excuses and give reasons why he did or did not do a certain thing, often shifting the blame to others. If the interrogator uses a sarcastic, caustic tone of voice with appropriate expressions of distaste or disgust, the source will readily believe him. Possible targets for the pride and ego-down approach are the source's—

- Loyalty.
- Technical competence.
- Leadership abilities.
- Soldierly qualities.
- Appearance.

The pride and ego-down approach is also a dead end n that, if unsuccessful, it is difficult for the interrogator o recover and move to another approach and reestablish a different type of rapport without losing all credibility.

### Futility

In this approach, the interrogator convinces the source that resistance to questioning is futile. When employing this technique, the interrogator must have factual information. These facts are presented by the interrogator in a persuasive, logical manner. He should be aware of and able to exploit the source's psychological and moral weaknesses, as well as weaknesses inherent in his society.

The futility approach is effective when the interrogator can play on doubts that already exist in the source's mind. There are different variations of the futility approach. For example:

- Futility of the personal situation—"You are not finished here until you answer the questions."
- Futility in that "everyone talks sooner or later."
- Futility of the battlefield situation.
- Futility in the sense if the source does not mind talking about history, why should he mind talking about his missions, they are also history.

If the source's unit had run out of supplies (ammunition, food, or fuel), it would be somewhat easy to convince him all of his forces are having the same logistical problems. A soldier who has been ambushed may have doubts as to how he was attacked so suddenly. The interrogator should be able to talk him into believing that the interrogator's forces knew of the EPW's unit location, as well as many more units.

The interrogator might describe the source's frightening recollections of seeing death on the battlefield as an everyday occurrence for his forces. Factual or seemingly factual information must be presented in a persuasive, logical manner, and in a matter-of-fact tone of voice.

Making the situation appear hopeless allows the source to rationalize his actions, especially if that action is cooperating with the interrogator. When employing this technique, the interrogator must not only have factual information but also be aware of and exploit the source's psychological, moral, and sociological weaknesses.

Another way of using the futility approach is to blow things out of proportion. If the source's unit was low on, or had exhausted, all food supplies, he can be easily

led to believe all of his forces had run out of food. If the source is hinging on cooperating, it may aid the interrogation effort if he is told all the other source's have cooperated.

The futility approach must be orchestrated with other approach techniques (for example, love of comrades). A source who may want to help save his comrades' lives may be convinced the battlefield situation is hopeless and they will die without his assistance.

The futility approach is used to paint a bleak picture for the prisoner, but it is not effective in and of itself in gaining the source's cooperation.

### We Know All

This approach may be employed in conjunction with the "file and dossier" technique (discussed below) or by itself. If used alone, the interrogator must first become thoroughly familiar with available data concerning the source. To begin the interrogation, the interrogator asks questions based on this known data. When the source hesitates, refuses to answer, or provides an incorrect or incomplete reply, the interrogator provides the detailed answer.

When the source begins to give accurate and complete information, the interrogator interjects questions designed to gain the needed information. Questions to which answers are already known are also asked to test the source's truthfulness and to maintain the deception that the information is already known. By repeating this procedure, the interrogator convinces the source that resistance is useless as everything is already known.

After gaining the source's cooperation, the interrogator still tests the extent of cooperation by periodically using questions to which he has the answers; this is very necessary. If the interrogator does not challenge the source when he is lying, the source will know everything is not known, and he has been tricked. He may then provide incorrect answers to the interrogator's questions.

There are some inherent problems with the use of the "we know all" approach. The interrogator is required to prepare everything in detail, which is time consuming. He must commit much of the information to memory, as working from notes may show the limits of the information actually known.

### File and Dossier

The file and dossier approach is used when the interrogator prepares a dossier containing all available information obtained from documents concerning the source or his organization. Careful arrangement of the material within the file may give the illusion it contains more data than actually there. The file may be padded with extra paper, if necessary. Index tabs with titles such as education, employment, criminal record, military service, and others are particularly effective.

The interrogator confronts the source with the dossiers at the beginning of the interrogation and explains intelligence has provided a complete record of every significant happening in the source's life; therefore, it would be useless to resist. The interrogator may read a few selected bits of known data to further impress the source.

If the technique is successful, the source will be intimidated by the size of the file, conclude everything is known, and resign himself to complete cooperation. The success of this technique is largely dependent on the naivete of the source, volume of data on the subject, and skill of the interrogator in convincing the source.

### Establish Your Identity

This approach is especially adaptable to interrogation. The interrogator insists the source has been correctly identified as an infamous individual wanted by higher authorities on serious charges, and he is not the person he purports to be. In an effort to clear himself of this allegation, the source makes a genuine and detailed effort to establish or substantiate his true identity. In so doing, he may provide the interrogator with information and leads for further development.

The "establish your identity" approach was effective in Viet Nam with the Viet Cong and in OPERATIONS JUST CAUSE and DESERT STORM.

This approach can be used at tactical echelons. The interrogator must be aware if it is used in conjunction with the file and dossier approach, as it may exceed the tactical interrogator's preparation resources.

The interrogator should initially refuse to believe the source and insist he is the criminal wanted by the ambiguous higher authorities. This will force the source to give even more detailed information about his unit in order to convince the interrogator he is who he says he is. This approach works well when combined with the "futility" or "we know all" approach.

### Repetition

This approach is used to induce cooperation from a ostile source. In one variation of this approach, the in-errogator listens carefully to a source's answer to a uestion, and then repeats the question and answer everal times. He does this with each succeeding ques-ion until the source becomes so thoroughly bored with he procedure he answers questions fully and candidly to atisfy the interrogator and gain relief from the onotony of this method.

The repetition technique must be judiciously used, as will generally be ineffective when employed against troverted sources or those having great self-control. fact, it may provide an opportunity for a source to gain his composure and delay the interrogation. In is approach, the use of more than one interrogator or ape recorder has proven effective.

### Rapid Fire

This approach involves a psychological ploy based on the principles that—

- Everyone likes to be heard when he speaks.
- It is confusing to be interrupted in mid-sentence with an unrelated question.

This approach may be used by one or simultaneously two or more interrogators in questioning the same rce. In employing this technique, the interrogator s a series of questions in such a manner that the rce does not have time to answer a question com-tely before the next one is asked.

his confuses the source and he will tend to con-lict himself, as he has little time to formulate his wers. The interrogator then confronts the source the inconsistencies causing further contradictions.

many instances, the source will begin to talk freely an attempt to explain himself and deny the rrogator's claims of inconsistencies. In this attempt, source is likely to reveal more than he intends, thus ting additional leads for further exploitation. This oach may be orchestrated with the pride and ego-n or fear-up approaches.

Besides extensive preparation, this approach requires an experienced and competent interrogator, with comprehensive case knowledge and fluency in the source's language.

### Silent

This approach may be successful when used against the nervous or confident source. When employing this technique, the interrogator says nothing to the source, but looks him squarely in the eye, preferably with a slight smile on his face. It is important not to look away from the source but force him to break eye contact first.

The source may become nervous, begin to shift in his chair, cross and recross his legs, and look away. He may ask questions, but the interrogator should not answer until he is ready to break the silence. The source may blurt out questions such as, "Come on now, what do you want with me?"

When the interrogator is ready to break silence, he may do so with some nonchalant questions such as, "You planned this operation for a long time, didn't you? Was it your idea?" The interrogator must be patient when using this technique. It may appear the technique is not succeeding, but usually will when given a reasonable chance.

### Change of Scene

The idea in using this approach is to get the source away from the atmosphere of an interrogation room or setting. If the interrogator confronts a source who is apprehensive or frightened because of the interrogation environment, this technique may prove effective.

In some circumstances, the interrogator may be able to invite the source to a different setting for coffee and pleasant conversation. During the conversation in this more relaxed environment, the interrogator steers the conversation to the topic of interest. Through this somewhat indirect method, he attempts to elicit the desired information. The source may never realize he is being interrogated.

Another example in this approach is an interrogator poses as a compound guard and engages the source in conversation, thus eliciting the desired information.

## QUESTIONING PHASE

e interrogation effort has two primary goals: To n information and to report it. Developing and good questioning techniques enable the interrogator to obtain accurate and pertinent information by following a logical sequence.

**June 6, 2002**

**Memorandum From: Under Secretary for Domestic Finance, Peter R. Fisher**

**To: Secretary of the Treasury, Paul O'Neill**

**RE: Corporate Governance - Closing-out of President's Working Group on Financial Markets Final Report**

DEPARTMENT OF THE TREASURY
WASHINGTON

June 6, 2002

ASSISTANT SECRETARY

**ACTION MEMORANDUM**

MEMORANDUM FOR SECRETARY O'NEILL

THROUGH: Peter Fisher, Under Secretary for Domestic Finance

FROM: Brian Roseboro, Assistant Secretary for Financial Markets

SUBJECT: Closing Out the President's Working Group on Financial Markets Final Report

**SUMMARY:**

This document would memorialize the Working Group's consensus before the President announced his Ten-Point Plan in March. It is intended for the files.

We had hoped to capture more consensus as "areas for further work" for the SEC, but faced resistance from CEA and NEC. Given that the report is not to be publicized, we think we can best serve the President by agreeing to a stripped-down draft.

For your reference, we have attached the penultimate draft we had advanced with the stricken text highlighted.

**RECOMMENDATIONS:**

That you sign the attached memo. We will then distribute the attached report to the other principals for their signature.

Approve _____ Disapprove _____ Discuss _____

CC: David Aufhauser, General Counsel
Richard Clarida, Assistant Secretary for Economic Policy

Attachments:
Memo to PWGFM principals
Final draft report
Penultimate draft (FYI)

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

**MEMORANDUM TO:** **CHAIRMAN ALAN GREENSPAN**
**CHAIRMAN HARVEY LLOYD PITT**
**CHAIRMAN JAMES E. NEWSOME**

**FROM:** **SECRETARY O'NEILL**

**SUBJECT:** **Memorializing consensus of the President's Working Group on Financial Markets on corporate disclosure**

Please find attached a final draft report regarding corporate disclosure.

The draft aims to memorialize our consensus beforé the President announced the Ten-Point Plan. It is intended for the files, not to be publicized.

Unless there are objections, a final version will be circulated for our joint signature.

cc: Chairman R. Glenn Hubbard
Assistant to the President Lawrence B. Lindsey

**Improving Corporate Financial Disclosure:**

**Report of the**
**President's Working Group on Financial Markets**

On January 10, 2002, President George W. Bush directed the President's Working Group on Financial Markets* to review the state of corporate financial disclosure in the United States and to articulate any needed reforms. This report presents the Working Group's conclusions and recommendations.

Our capital markets are the deepest, most liquid, and most transparent in the world. And our corporate disclosure practices are envied around the globe. Yet the recent collapses of several firms (most notably Enron) and a rash of earnings restatements have taught us once again not to take our system of corporate financial disclosure for granted. For investors to price risk properly and allocate capital to the most promising firms, public companies must reveal a fair, meaningful, and timely presentation of their financial condition to their investors. They must enable investors to see the company through the eyes of management.

In extreme cases, corporate leaders have intentionally misled investors. Such cases have fortunately been rare. More widespread in some of professional and corporate America is a deterioration of responsibility and accountability. Paradoxically, this deterioration has resulted in part from efforts by investors to hold corporate management accountable. Unfortunately, investor pressures have focused on short-term corporate earnings, rather than long-term performance. Under this pressure, CEOs have too often tapped accounting devices whose sole purpose is to inflate short-term earnings.

This deterioration of corporate responsibility and accountability has fostered an ethic equating GAAP compliance with adequate disclosure. This ethic sets the bar too low. Corporate leaders should disclose all the information in their control that investors need to make valuation and investment decisions.

The Working Group recommends working toward a value system of responsibility and accountability oriented toward sustained, long-term growth, not short term gain. Four reforms are needed: (1) re-aligning corporate disclosure practices with the long-term needs of investors; (2) enforcing and expanding the duties of corporate leaders and auditors without inviting frivolous litigation; (3) ensuring auditor independence from management without the inefficiency of rigid, uniform restrictions on auditor relationships with clients; and (4) re-structuring accounting standard-setting to respond to the needs of investors.

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* The Working Group includes the Secretary of the Treasury as chair, the Chairman of the Board of Governors of the Federal Reserve System, the Chairman of the Securities and Exchange Commission, and the Chairman of the Commodity Futures Trading Commission. We were joined by the Chairman of the Council of Economic Advisers and the Director of the National Economic Council.

**1. Re-align corporate disclosure practices with the long-term needs of investors**

The standard for sufficient disclosure must be raised. Companies must disclose the information in their control that a reasonable investor would find necessary to assess the company's value, without compromising competitive secrets. GAAP compliance is necessary, but not sufficient.

*Recommendations.* The SEC should re-clarify what constitutes adequate disclosure, and ensure that public companies are responsible for providing investors with a true and fair picture, in plain English, of their financial performance, condition, and risks. To hasten disclosures of critical information, the SEC should expand the list of significant events requiring prompt disclosure between reporting periods.

**2. Expand and enforce duties of corporate leaders and auditors**

To make sure companies meet this intensified and re-clarified disclosure standard, law and regulation must heighten corporate leaders' and auditors' awareness of their disclosure duties, and must impose more effective penalties for failure. And reform must start at the top, with the CEO.

*Recommendations.* The SEC should require that CEOs personally vouch for the veracity, timeliness, and fairness of their companies' public disclosures, including their financial statements. CEOs should attest each quarter that the financial statements and company disclosures accurately and fairly disclose the information of which the CEO is aware that a reasonable investor should have to make an informed investment decision.

If a CEO or other corporate officer is guilty of misconduct that requires corrective financial re-statements, the SEC should compel that person to surrender any compensation gained thereby. Similarly, if corporate leaders clearly abuse their power, the SEC should deny them the right to serve as a director or officer of any public company. The SEC should be able to do so via administrative action (with rights of appeal). This new power would require legislation.

Corporate leaders should also be required to inform investors promptly – within two business days of execution – whenever they buy or sell stock in their company for personal gain.

**3. Tighten auditor independence and oversight**

Auditor independence requires a revised regulatory framework. Regulatory oversight of auditors is insufficient; audit committee responsibilities to ensure auditor independence are ill-defined; and investors know too little about a firm's choice of and relationship with its auditor.

Auditor independence requires a revised regulatory framework. Regulatory oversight of auditors is insufficient; audit committee responsibilities to ensure auditor independence are ill-defined; and investors know too little about a firm's choice of and relationship with its auditor.

*Recommendations*. Audit committees of public companies ought to be a bulwark for ensuring auditor independence from management. The SEC should establish guidelines for audit committees to prohibit an external auditor from performing any other service to an audit client, if the service compromises the independence of the audit.* Due to the inherent conflict of interest, the SEC should prohibit an outside auditor from doing internal audits for the same client.

A company should disclose in greater detail all fees it pays to the outside auditor and its affiliates. The audit committee should directly report their recommended choice of auditor to shareholders.

To ensure excellence in financial disclosure, the outside auditor should be obliged to compare the company's financial controls against industry best practices and communicate findings to the audit committee. The audit committee itself would be further obligated to discuss these findings and the improvement of practices with management, the Board of Directors, and the auditor, and to act independently to require improvement where necessary.

The Working Group further supports the creation of a new private-sector independent regulatory body, under the supervision of the SEC, to oversee the auditing and accounting profession. This body would set and enforce audit standards and professional conduct. It could review accounting firms' practices and have the power to review specific audits. The bulk of the body's leaders should be free of ties to the accounting industry. Its funding mechanism should be independent and not subject to outside pressure. The SEC can create a body like this under existing legislation.

**4. Re-structure accounting standard-setting to be independent and responsive to investors**

Standard-setting by the Financial Accounting Standards Board (FASB) and associated entities must be more responsive to the needs of investors and more independent of the accounting industry. Investors should have the loudest voice in selecting FASB's members.

*Recommendation.* The SEC should take a more proactive role in setting FASB's rule-making agenda and eliciting prompt action. FASB funding should come from the private sector and be independent of the accounting industry's influence. FASB should endeavor to streamline its decision-making (e.g., make decisions by 4-3 simple majorities, not 5-2 super-majorities). And FASB should promote principle-based standards as opposed to standards based on technical

* Some have proposed outright bans on non-audit consulting work by audit firms to the same client, or mandatory rotation of audit firms or audit partners. We oppose these bright-line, inflexible rules, because their certain costs and unintended consequences outweigh their uncertain prophylactic benefits. Such rules would obstruct or prevent any company from tapping the intellectual capital it develops with its outside auditor. They also could undermine auditor effectiveness by ensuring periodic auditor ignorance or, contrary to the objective, weakening auditor independence. The Working Group is especially opposed to drawing these bright-lines in a statute.

**Improving Corporate Financial Disclosure:**

**Report of the**
**President's Working Group on Financial Markets**

*This draft was circulated April 9 to CEA and NEC. The Federal Reserve deputy (Vice Chairman Ferguson) and staff had already assented. It also reflected comments from CEA and NEC, except the text we ultimately deleted – the "areas for further work," **in bold.***

On January 10, 2002, President George W. Bush directed the President's Working Group on Financial Markets* to review the state of corporate financial disclosure in the United States and to articulate any needed reforms. This report presents the Working Group's conclusions and recommendations.

Our capital markets are the deepest, most liquid, and most transparent in the world. And our corporate disclosure practices are envied around the globe. Yet the recent collapses of several firms (most notably Enron) and a rash of earnings restatements have taught us once again not to take our system of corporate financial disclosure for granted. For investors to price risk properly and allocate capital to the most promising firms, public companies must reveal a fair, meaningful, and timely presentation of their financial condition to their investors. They must enable investors to see the company through the eyes of management.

In extreme cases, corporate leaders have intentionally misled investors. Such cases have fortunately been rare. More widespread in some of professional and corporate America is a deterioration of responsibility and accountability. Paradoxically, this deterioration has resulted in part from efforts by investors to hold corporate management accountable. Unfortunately, investor pressures have focused on short-term corporate earnings, rather than long-term performance. Under this pressure, CEOs have too often tapped accounting devices whose sole purpose is to inflate short-term earnings.

This deterioration has fostered an ethic equating GAAP compliance with adequate disclosure. This ethic sets the bar too low. Corporate leaders should disclose all the information in their control that that investors need to make valuation and investment decisions.

The Working Group recommends working toward a value system of responsibility and accountability oriented toward sustained, long-term growth, not short term gain. Four reforms are needed: (1) re-aligning corporate disclosure practices with the long-term needs of investors; (2) enforcing and expanding the duties of corporate leaders and auditors without inviting frivolous litigation; (3) ensuring auditor independence from management without the inefficiency of rigid, uniform restrictions on auditor relationships with clients; and (4) re-structuring accounting standard-setting to respond to the needs of investors.

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The SEC has the power under existing law to implement most of these reforms and already is working diligently to do so. One proposal requires legislation (administrative bans for directors and officers – see #2 below).

**1. Re-align corporate disclosure practices with the long-term needs of investors**

The standard for sufficient disclosure must be raised. Companies must disclose the information in their control that a reasonable investor would find necessary to assess the company's value, without compromising competitive secrets. GAAP compliance is necessary, but not sufficient.

*Recommendations.* The SEC should re-clarify what constitutes adequate disclosure, and ensure that public companies are responsible for providing investors with a true and fair picture, in plain English, of their financial performance, condition, and risks. To hasten disclosures of critical information, the SEC should expand the list of significant events requiring prompt disclosure between reporting periods.

***Areas for further work.*** **The Working Group supports new requirements (through SEC regulation or private-sector standard-setting) for public companies to offer better disclosures in these key areas:**

- **All material forward and contingent liabilities and assets (no hiding off-balance sheet)**
- **Performance and position throughout a reporting period, if material fluctuations exist, to avoid end-period window dressing (e.g., average investment balances for a bank)**
- **Sensitivity of the company's financial statements and condition to its most critical accounting policies**
- **Related party transactions.**

**2. Expand and enforce duties of corporate leaders and auditors**

To make sure companies meet this intensified and re-clarified disclosure standard, law and regulation must heighten corporate leaders' and auditors' awareness of their disclosure duties, and must impose more effective penalties for failure. And reform must start at the top, with the CEO.

*Recommendations.* The SEC should require that CEOs personally vouch for the veracity, timeliness, and fairness of their companies' public disclosures, including their financial statements. CEOs should attest each quarter that the financial statements and company disclosures accurately and fairly disclose the information of which the CEO is aware that a reasonable investor should have to make an informed investment decision.

If a CEO or other corporate officer is guilty of misconduct that requires corrective financial re-statements, the SEC should compel that person to surrender any compensation gained thereby. Similarly, if corporate leaders clearly abuse their power, the SEC should deny them the right to serve as a director or officer of any public company. The SEC should be able to do so via administrative action (with rights of appeal). This new power would require legislation.

Corporate leaders should also be required to inform investors promptly – within two business days of execution – whenever they buy or sell stock in their company for personal gain.

*Areas for further work.* **To encourage CEOs' taking responsibility for disclosures, the Working Group recommends that the SEC examine requiring CEOs to be personally responsible for establishing procedures to bring the requisite information to the CEO's attention. CEOs should not be able to evade their disclosure duty by consciously or recklessly avoiding personal knowledge of information. The SEC should also consider affirmative obligations for auditors to parallel the CEO's attestation.**

### 3. Tighten auditor independence and oversight

Auditor independence requires a revised regulatory framework. Regulatory oversight of auditors is insufficient; audit committee responsibilities to ensure auditor independence are ill-defined; and investors know too little about a firm's choice of and relationship with its auditor.

*Recommendations*. Audit committees of public companies ought to be a bulwark for ensuring auditor independence from management. The SEC should establish guidelines for audit committees to prohibit an external auditor from performing any other service to an audit client, if the service compromises the independence of the audit.* Due to the inherent conflict of interest, the SEC should prohibit an outside auditor from doing internal audits for the same client.

A company should disclose in greater detail all fees it pays to the outside auditor and its affiliates. The audit committee should directly report their recommended choice of auditor to shareholders.

To ensure excellence in financial disclosure, the outside auditor should be obliged to compare the company's financial controls against industry best practices and communicate findings to the audit committee. The audit committee itself would be further obligated to discuss these findings and the improvement of practices with management, the Board of Directors, and the auditor, and to act independently to require improvement where necessary.

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The Working Group further supports the creation of a new private-sector independent regulatory body, under the supervision of the SEC, to oversee the auditing and accounting profession. This body would set and enforce audit standards and professional conduct. It could review accounting firms' practices and have the power to review specific audits. The bulk of the body's leaders should be free of ties to the accounting industry. Its funding mechanism should be independent and not subject to outside pressure. The SEC can create a body like this under existing legislation.

***Areas for further work.*** **The Working Group recommends that the SEC examine granting audit committees the sole authority to hire and fire auditors, as well as imposing obligations for audit committees to review the independence, ethics, and competence of auditors, and to understand and approve key accounting decisions and judgments.**

**4. Re-structure accounting standard-setting to be independent and responsive to investors**

Standard-setting by the Financial Accounting Standards Board (FASB) and associated entities must be more responsive to the needs of investors and more independent of the accounting industry. Investors should have the loudest voice in selecting FASB's members.

*Recommendation.* The SEC should take a more proactive role in setting FASB's rule-making agenda and eliciting prompt action. FASB funding should come from the private sector and be independent of the accounting industry's influence. FASB should endeavor to streamline its decision-making (e.g., make decisions by 4-3 simple majorities, not 5-2 super-majorities). And FASB should promote principle-based standards as opposed to standards based on technical minutiae. Again, the SEC has authority under current law to implement or facilitate these proposals.

# TREASURY CLEARANCE SHEET

*5/23/02*

**MEMORANDUM FOR:** SECRETARY DEPUTY SECRETARY Γ UNDER SECRETARY
Γ ACTION Γ BRIEFING Γ INFORMATION Γ LEGISLATION
Γ PRESS RELEASE Γ PUBLICATION Γ REGULATION Γ SPEECH
Γ EXECUTIVE SECRETARY Γ TESTIMONY Γ OTHER

**THRU:** Peter Fisher
Under Secretary for Domestic Finance

**FROM:** Brian Roseboro
Assistant Secretary for Financial Markets

**SUBJECT:** Closing Out the President's Working Group on Financial Markets Final Report

**REVIEW OFFICES:**
**(Check when office clears)**

| NAME (Please Type) | INITIAL | DATE | OFFICE/ROOM NO. | TEL. NO. |
|---|---|---|---|---|
| INITIATOR(S) | | | | |
| Mark Wiedman | MW | 5/22/02 | Senior Advisor – Financial Markets | 2-4041 |
| REVIEWERS: | | | | |
| David Aufhauser | DA | 5/31/02 | General Counsel | 2-0283 |
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June 21, 2003

From: Chief Actuary for the Health Care Financing Administration, Richard S. Foster

To: Representative William M. Thomas, Chairman, House Ways and Means Committee

RE: Estimated Proportion of Medicare Beneficiaries Who Would Purchase Drug Insurance Coverage under Ways and Means Committee Reform Package

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop N3-01-21
Baltimore, Maryland 21244-1850

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

Office of the Actuary

**DATE:** June 21, 2003

**FROM:** Richard S. Foster
Chief Actuary

**TO:** Representative William M. Thomas
Chairman
Ways and Means Committee

**SUBJECT:** Estimated Proportion of Medicare Beneficiaries Who Would Purchase Drug Insurance Coverage under Ways and Means Medicare Reform Package

The Medicare reform legislative package reported earlier this week by the House Ways and Means Committee would provide for a voluntary program of prescription drug coverage for Medicare beneficiaries. Coverage would be offered through insurance companies and health plans, with partial Federal reinsurance for beneficiaries incurring high drug costs and with a Federal premium subsidy. Together, the reinsurance and premium subsidy would cover 73 percent of the average value of the drug benefit, for beneficiaries with annual incomes below $60,000. Beneficiaries could enroll in this program at any time but would face potential higher premium rates or preexisting condition exclusions if they delayed enrollment past their first opportunity.

We estimate that virtually all Medicare beneficiaries (i.e., at least 95 percent) would opt for such drug coverage. In general, we would expect a very high participation rate for any drug benefit with a substantial premium subsidy and potential penalties for late enrollment.

Please let us know if you have any questions about this information or if we can be of additional assistance.

Richard S. Foster, F.S.A.
Chief Actuary

cc: Thomas A. Scully

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop N3-01-21
Baltimore, Maryland 21244-1850

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

**DATE:** June 26, 2003

**FROM:** Richard S. Foster
Office of the Actuary

**TO:** Representative Charles B. Rangel
Ranking Member
House Committee on Ways and Means

**SUBJECT:** Estimated Impact of H.R. 1 on Premiums for Fee-for-Service Beneficiaries in 2010 and Later

Under H.R. 1, the "Medicare Prescription Drug and Modernization Act of 2003," premiums paid by beneficiaries in traditional fee-for-service Medicare would not be affected by the operations of private health plans prior to 2010. Beginning in 2010, the determination of such premiums for beneficiaries residing in "competitive" areas would be affected by the level of fee-for-service costs in the area compared to private plan costs. (In other areas—that is, those not meeting the criteria defining competitive areas—there would be no change in fee-for-service premiums.) A transition rule would limit year-to-year changes in fee-for-service premiums. This memorandum presents estimates of the changes in fee-for-service premiums under H.R. 1 in 2010 and later, for beneficiaries residing in "competitive Medicare Advantage areas" and "competitive Enhanced Fee-for-Service regions."[1]

It is important to understand that the impact of H.R. 1 on premiums for fee-for-service beneficiaries would vary substantially depending on such factors as:

- The cost of private EFFS and MA health plans relative to fee-for-service cost levels;
- The percentage of Medicare beneficiaries enrolled in traditional fee-for-service, EFFS plans, and MA plans, both for regions and for the nation overall; and
- The number of consecutive years that an area was "competitive," as defined in the bill.

As described below, we generally estimate that premiums for fee-for-service beneficiaries in competitive MA areas or EFFS regions would exceed those under current law. There are plausible situations, however, in which such premiums in some areas could instead be slightly lower than current-law levels.

[1] The beneficiary premium provisions in H.R. 1 for 2010 and later are complex, and a summary of these provisions exceeds the scope of this memorandum. Reference should be made to section 241 of the legislation for the specific definitions, rules, and formulas.

For areas in their fifth consecutive year as competitive MA areas or competitive EFFS regions (which would occur in 2014 at the earliest), the fee-for-service premium adjustment would be fully phased in, and we estimate that:

- For fee-for-service beneficiaries in competitive MA areas, premiums would be roughly 5 to 25 percent greater than under current law. This estimate is sensitive to the average cost of MA plans in the area and to the beneficiary enrollments in fee-for-service versus private plans.[2]

- For fee-for-service beneficiaries in competitive EFFS regions who are not also in competitive MA areas, monthly premiums would be slightly greater than under current law (for example, about 2 to 4 percent greater in 2014). This result is sensitive to the average level of private EFFS plan costs in the region and to the proportion of beneficiaries in fee-for-service compared to private plans.[3]

The transition provision would phase in any adjustments to fee-for-service premiums, based on the consecutive number of years that the area had been competitive. One-fifth of the full adjustment would be applied in the first such year, two-fifths in the second consecutive year, three-fifths in the third year, etc.[4] Consequently, the estimated ultimate premium impacts described above would be proportionally smaller during the initial transition (which would be 2010 through 2014 for many areas) or any later period involving fewer than 5 consecutive years as a competitive area. In addition, there is a possibility that, in some competitive MA areas during the transition, fee-for-service premiums would be adjusted downward rather than upward. This situation could occur if the average cost of HMOs in that area were greater than the fee-for-service cost level. By the final year of the transition, however, after the higher payment benchmarks for private plan premium determinations had phased out, we would expect any such areas to revert to non-competitive status. In this case, fee-for-service premiums would not be affected.

As noted above, these estimates apply only to Medicare beneficiaries residing in competitive MA or EFFS areas. Under H.R. 1, not all areas would meet the competitive criteria, in which case premiums for fee-for-service beneficiaries would not be affected. We have not yet estimated the proportions of beneficiaries who would enroll in fee-for-service Medicare versus MA or EFFS private health plans in 2010 and later. Prior to 2010, we estimate that roughly 57 percent of

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[2] With relatively high private plan enrollment, as we estimate, fee-for-service premium increases would be at the upper end of our estimated 5-25 percent range. With relatively low private enrollment, as estimated by the Congressional Budget Office, the fee-for-service premium increase would tend to be at the lower end of this range.

[3] We estimate that, by 2014, the average cost of the three winning PPO plans in most EFFS regions would be slightly less than the region's fee-for-service cost. If PPO costs were instead significantly greater, as estimated by CBO, then fee-for-service premiums in competitive EFFS regions would tend to be slightly less than current law, depending on the proportion of beneficiaries in the region enrolled in private plans.

[4] If a region or area that had been competitive subsequently became non-competitive, then fee-for-service premiums would revert to their normal, unadjusted level. If in later years the area again became competitive, then the transition would start over and fee-for-service premiums would again follow the pattern described above.

beneficiaries would remain in the fee-for-service program, with a total of roughly 43 percent in MA and EFFS plans.[5]

As suggested by the foregoing discussion, the impact of the post-2010 competition provisions on fee-for-service premiums is complex. In addition, the estimates shown in this memorandum reflect considerable uncertainty due to (i) lack of robust data on private plan costs, (ii) possible changes in beneficiary enrollments in reaction to the premium changes after 2010, (iii) ambiguity in certain of the draft legislative provisions, and (iv) the limited time available for preparation of these estimates, which necessitated simplified estimation methods. Consequently, while we believe that these estimates provide a reasonable indication of future fee-for-service premium levels under the draft legislation, they should be considered preliminary and used only with full awareness of their limitations.

Richard S. Foster, F.S.A.
Chief Actuary

[5] For previous versions of the Medicare reform legislation, as developed in the Ways and Means Committee, we had estimated private plan enrollment at 48 percent prior to 2010. The lower estimate for H.R. 1 results from a change in the calculation of Medicare Advantage payment rates under section 212.

## Rough estimates of increase in net Medicare and other Federal costs under selected draft Senate Finance proposals

(Based on June 10, 2003 "Chairman's Mark;" amounts in billions)

| Proposal | Fiscal year | | | | | | | | | | Total | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2004-2008 | 2004-2013 |
| Medicare Advantage (effective 2006): | | | | | | | | | | | | |
| HMOs | — | — | $1.4 | $1.8 | $1.8 | $2.0 | $2.1 | $2.2 | $2.3 | $2.4 | $5.0 | $16.0 |
| PPOs | — | — | $2.3 | $3.8 | $4.1 | $4.2 | $4.3 | $4.4 | $4.5 | $4.6 | $10.2 | $32.0 |
| Total for Medicare Advantage | — | — | $3.7 | $5.5 | $5.9 | $6.2 | $6.4 | $6.6 | $6.8 | $7.0 | $15.1 | $48.0 |
| Prescription drug benefit: | | | | | | | | | | | | |
| Increase in Medicare costs | $3.6 | $5.5 | $36.5 | $48.7 | $53.1 | $57.9 | $62.7 | $68.0 | $75.8 | $85.2 | $147.5 | $496.9 |
| Net increase in Fed. Medicaid costs | — | — | $4.0 | $5.8 | $6.2 | $6.7 | $7.2 | $7.7 | $8.2 | $8.8 | $16.0 | $54.6 |
| Total for drug benefit | $3.6 | $5.5 | $40.5 | $54.5 | $59.3 | $64.5 | $69.9 | $75.7 | $84.0 | $94.0 | $163.4 | $551.5 |

Notes:

1. Medicare Advantage estimates are very rough and provide only a general indication of the financial effect of this provision. In particular, under the draft legislation, there could be significant shifts in enrollment between HMOs and PPOs, which are not reflected in these estimates.

2. The draft SFC Medicare reform package has other provisions beyond those shown here. Estimates are not yet available for these other provisions.

3. See our June 5, 2003 note on alternative benchmarks for a description of why costs would increase under the Medicare Advantage PPO option. See cover e-mail regarding nature of HMO cost increase.

4. The "increase in net Medicare costs" refers to an increase in benefit expenditures and/or reduction in premium revenues. Estimates do not include impact of proposals on Federal administrative costs.

Office of the Actuary
Centers for Medicare Medicaid Services
June 11, 2003

Senate June 11, 2003 Version

June 11, 2003 Model Run

| FY | Deductible | Initial coverage limit | Coinsurance rate | Catastrophic out-of-pocket threshold | Catastrophic coinsurance rate | Average monthly premium | Federal costs ($ billions) General Premium Subsidy | Rein-surance | Low income subsidy | Rx card and transitional low-income subsidy | Total Medicare | Federal Medicaid | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2004 | | | | | | | | | | $3.6 | $3.6 | $0.0 | $3.6 |
| 2005 | | | | | | | | | | $5.5 | $5.5 | $0.0 | $5.5 |
| 2006 | $275 | $3,450 | 50% | $3,700 | 10% | $31.80 | $17.0 | $8.0 | $9.2 | $2.3 | $36.5 | $4.0 | $40.5 |
| 2007 | $303 | $3,802 | 50% | $4,077 | 10% | $34.59 | $24.4 | $11.2 | $13.1 | $0.0 | $48.7 | $5.8 | $54.5 |
| 2008 | $333 | $4,174 | 50% | $4,477 | 10% | $37.48 | $27.0 | $11.8 | $14.4 | $0.0 | $53.1 | $6.2 | $59.3 |
| 2009 | $364 | $4,571 | 50% | $4,902 | 10% | $40.48 | $29.8 | $12.4 | $15.7 | $0.0 | $57.9 | $6.7 | $64.5 |
| 2010 | $398 | $4,992 | 50% | $5,353 | 10% | $43.55 | $32.7 | $12.9 | $17.1 | $0.0 | $62.7 | $7.2 | $69.9 |
| 2011 | $434 | $5,451 | 50% | $5,846 | 10% | $46.82 | $35.9 | $13.5 | $18.5 | $0.0 | $68.0 | $7.7 | $75.7 |
| 2012 | $474 | $5,952 | 50% | $6,384 | 10% | $51.21 | $40.3 | $14.9 | $20.6 | $0.0 | $75.8 | $8.2 | $84.0 |
| 2013 | $518 | $6,500 | 50% | $6,971 | 10% | $55.91 | $45.5 | $16.8 | $23.0 | $0.0 | $85.2 | $8.8 | $94.0 |
| 2004-2013 | | | | | | | $252.5 | $101.5 | $131.5 | $11.4 | $496.9 | $54.6 | $551.5 |

Notes: Dual-eligible Medicaid beneficiaries will retain their current Medicaid coverage. Medicare will waive the state requirement to pay the Part B premium for beneficiaries between 74% and 100% of the Federal poverty level. **Medicaid dual beneficiaries would not enroll in Medicare drug plans.**

Low-income persons (non dual-eligible Medicaid) will have the following benefit provisions and premium subsidies in 2006.

| | QMB | SLMB / QI-1 | <135% poverty | 135-160% poverty |
|---|---|---|---|---|
| Deductible | $0 | $0 | $50 | $50 |
| Coinsurance to initial coverage limit | 2.5% | 5.0% | 10.0% | 10.0% |
| Coinsurance to catastrophic threshold | 5.0% | 10.0% | 20.0% | 20.0% |
| Coinsurance above catastrophic threshold | 2.5% | 2.5% | 10.0% | 10.0% |
| Premium subsidy | 100.0% | 100.0% | 100.0% | Sliding scale |

Low-income Medicare beneficiaries (under 135% of poverty) who apply and are determined to be eligible will receive up to $600 in 2004 and 2005 for the purchase of qualifying outpatient prescription drugs.

States would realize a Medicaid savings of $4.1 billion for the period 2006-2013.

Office of the Actuary
Centers for Medicare Medicaid Services
June 11, 2003

**June 23, 2003**

# President Bush declaration of enemy combatant status

THE WHITE HOUSE

WASHINGTON

TO THE SECRETARY OF DEFENSE AND THE ATTORNEY GENERAL:

Based on the information available to me from all sources,

FILED

JUN 23 2003

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

**REDACTED**

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Ali Saleh Kahlah al-Marri, who is under the control of the Department of Justice, is, and at the time he entered the United States in September 2001 was, an enemy combatant;
(2) Mr. al-Marri is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;
(3) Mr. al-Marri engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;
(4) Mr. al-Marri possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;
(5) Mr. al-Marri represents a continuing, present, and grave danger to the national security of the United States, and detention of Mr. al-Marri is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;
(6) it is in the interest of the United States that the Secretary of Defense detain Mr. al-Marri as an enemy combatant; and
(7) it is, REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. al-Marri as an enemy combatant.

Accordingly, the Attorney General is directed to surrender Mr. al-Marri to the Secretary of Defense, and the Secretary of Defense is directed to receive Mr. al-Marri from the Department of Justice and to detain him as an enemy combatant.

DATE: 6/23/03

White House Office-controlled Document

June 26, 2003

From: Chief Actuary for the Health Care Financing Administration, Richard S. Foster

To: Representative Charles Rangel, Ranking Member, House Ways and Means Committee

RE: Estimated Impact of H.R. 1 on Premiums for Fee-for-Service Beneficiaries in 2010 and Later

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop N3-01-21
Baltimore, Maryland 21244-1850

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

**DATE:** June 26, 2003

**FROM:** Richard S. Foster
Office of the Actuary

**TO:** Representative Charles B. Rangel
Ranking Member
House Committee on Ways and Means

**SUBJECT:** Estimated Impact of H.R. 1 on Premiums for Fee-for-Service Beneficiaries in 2010 and Later

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beneficiaries would remain in the fee-for-service program, with a total of roughly 43 percent in MA and EFFS plans.[5]

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| Medicare Advantage (effective 2006): | | | | | | | | | | | | |
| HMOs | — | — | $1.4 | $1.8 | $1.8 | $2.0 | $2.1 | $2.2 | $2.3 | $2.4 | $5.0 | $16.0 |
| PPOs | — | — | $2.3 | $3.8 | $4.1 | $4.2 | $4.3 | $4.4 | $4.5 | $4.6 | $10.2 | $32.0 |
| Total for Medicare Advantage | — | — | $3.7 | $5.5 | $5.9 | $6.2 | $6.4 | $6.6 | $6.8 | $7.0 | $15.1 | $48.0 |
| Prescription drug benefit: | | | | | | | | | | | | |
| Increase in Medicare costs | $3.6 | $5.5 | $36.5 | $48.7 | $53.1 | $57.9 | $62.7 | $68.0 | $75.8 | $85.2 | $147.5 | $496.9 |
| Net increase in Fed. Medicaid costs | — | — | $4.0 | $5.8 | $6.2 | $6.7 | $7.2 | $7.7 | $8.2 | $8.8 | $16.0 | $54.6 |
| Total for drug benefit | $3.6 | $5.5 | $40.5 | $54.5 | $59.3 | $64.5 | $69.9 | $75.7 | $84.0 | $94.0 | $163.4 | $551.5 |

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Office of the Actuary
Centers for Medicare Medicaid Services
June 11, 2003

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|---|---|---|---|---|
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| Coinsurance to initial coverage limit | 2.5% | 5.0% | 10.0% | 10.0% |
| Coinsurance to catastrophic threshold | 5.0% | 10.0% | 20.0% | 20.0% |
| Coinsurance above catastrophic threshold | 2.5% | 2.5% | 10.0% | 10.0% |
| Premium subsidy | 100.0% | 100.0% | 100.0% | Sliding scale |

Low-income Medicare beneficiaries (under 135% of poverty) who apply and are determined to be eligible will receive up to $600 in 2004 and 2005 for the purchase of qualifying outpatient prescription drugs.

States would realize a Medicaid savings of $4.1 billion for the period 2006-2013.

Office of the Actuary
Centers for Medicare Medicaid Services
June 11, 2003

**October 16, 2003**

**From: Secretary of Defense, Donald Rumsfeld**

**TO: Gen. Dick Myers, Paul Wolfowitz, Gen. Pete Pace, Doug Feith**

**RE: Global War on Terrorism**

**October 16, 2003**

TO: Gen. Dick Myers
Paul Wolfowitz
Gen. Pete Pace
Doug Feith

FROM: Donald Rumsfeld

SUBJECT: Global War on Terrorism

The questions I posed to combatant commanders this week were: Are we winning or losing the Global War on Terror? Is DoD changing fast enough to deal with the new 21st century security environment? Can a big institution change fast enough? Is the USG changing fast enough?

DoD has been organized, trained and equipped to fight big armies, navies and air forces. It is not possible to change DoD fast enough to successfully fight the global war on terror; an alternative might be to try to fashion a new institution, either within DoD or elsewhere—one that seamlessly focuses the capabilities of several departments and agencies on this key problem.

With respect to global terrorism, the record since September 11th seems to be:

— We are having mixed results with Al Qaida, although we have put considerable pressure on them—nonetheless, a great many remain at large.

— USG has made reasonable progress in capturing or killing the top 55 Iraqis.

— USG has made somewhat slower progress tracking down the Taliban—Omar, Hekmatyar, etc.

— With respect to the Ansar Al-Islam, we are just getting started.

Have we fashioned the right mix of rewards, amnesty, protection, and confidence in the US?

Does DoD need to think through new ways to organize, train, equip and focus to deal with the global war on terror?

Are the changes we have and are making too modest and incremental? My impression is that we have not yet made truly bold moves, although we have made many sensible, logical moves in the right direction, but are they enough?

Today we lack metrics to know if we are winning or losing the global war on terror. Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?

Does the US need to fashion a broad, integrated plan to stop the next generation of terrorists? The US is putting relatively little effort into a long-range plan, but we are putting a great deal of effort into trying to stop terrorists. The cost-benefit ratio is against us! Our cost is billions against the terrorists' costs of millions.

- Do we need a new organization?
- How do we stop those who are financing the radical madrassa schools?
- Is our current situation such that "the harder we work, the behinder we get" ?

It is pretty clear that the coalition can win in Afghanistan and Iraq in one way or another, but it will be a long, hard slog.

Does CIA need a new finding?

Should we create a private foundation to entice radical madradssas to a more moderate course?

What else should we be considering?

Please be prepared to discuss this at our meeting on Saturday or Monday.

Thanks.

DHR:dh
101503-58

*Please respond by* _____

**January 14, 2004**

Letter

From: U.S. Representative Henry A.Waxman
to: Assistant to the President for National Security Affairs, Condoleezza Rice

Re: Waxman's concern thatthere are inconsistencies between the leak investigations in former Secretary of Treasury Paul O'Neill and the possible leak of the identity of a covert CIA agent by Bush Administration officials.

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INDEPENDENT

January 14, 2004

The Honorable Condoleezza Rice
Assistant to the President for National Security Affairs
The White House
Washington, DC 20500

Dear Ms. Rice:

I am writing to you in your role as the highest ranking White House official responsible for security matters to seek information regarding apparent inconsistencies in how the Administration handles allegations regarding the release of sensitive information.

This week, within one day of former Secretary of Treasury Paul O'Neill's television interview in which he voiced criticism of the Bush Administration, the Administration publicly announced it was investigating whether Secretary O'Neill had improperly disclosed confidential information.[1] Similarly, on June 20, 2002, "an irate" Vice President Cheney reportedly told congressional leaders that the President had "deep concerns" about media accounts from just one day earlier that the National Security Agency had September 10, 2001, communications intercepts with cryptic references to possible attacks the next day. The reports cited congressional sources, and congressional leaders immediately requested a Justice Department investigation of the matter.[2]

In contrast, over two months passed before there was any apparent Administration investigation of the July 14, 2003, disclosure of the identity of a CIA covert agent in a Robert

[1] On Sunday evening, January 11, 2004, CBS's *60 Minutes* aired an interview with Secretary O'Neill in which he made negative comments about the President and Administration policy. On Monday, January 12, 2004, the Department of the Treasury announced that its Office of the Inspector General was investigating whether Secretary O'Neill inappropriately disclosed official documents, noting that a document marked "secret" was shown on the *60 Minutes* program as part of the interview. *O'Neill Says He Didn't Take U.S. Treasury Documents*, Reuters (Jan. 13, 2004).

[2] *White House Angered by Leaks on Intelligence*, Los Angeles Times (June 21, 2002).

Novak column that sourced two senior Administration officials.[3] In fact, in the weeks immediately following the publication of the agent's identity, the White House was dismissive regarding questions about whether it would investigate the matter, emphasizing that it was difficult to look into reports of sources that were not named specifically.[4] It was not until after September 26, 2003, when the media reported that the CIA had requested a Justice Department investigation, that the White House expressed concern about this leak.[5]

---

[3] *See The Mission to Niger*, Chicago Sun-Times (July 14, 2003).

[4] When asked on July 22, 2003, whether the White House would "support an investigation" of the exposure of the CIA agent, the following exchange ensued:

> White House Spokesman: Well, I'd have to look into the specifics about whether or not that characterization is accurate when you're talking about someone's cover. But let me make it very clear, that's just not the way this White House operates.
>
> Reporter: Could you look into it?
>
> White House Spokesman: I'm sorry. I'll be available later.

The White House, *Press Briefing by Scott McClellan* (July 22, 2003). On the next day, July 23, 2003, a reporter asked whether the White House was doing an internal investigation to find out who may have disclosed the identity of the agent. The following is the White House spokesman's response:

> White House Spokesman: I have no reason to believe that there is any truth that that has happened. So if I thought that there was any reason to believe that something like that had happened, I would —
>
> Reporter: So you're saying that reporters just made it up?
>
> White House Spokesman: — try to get to the bottom. Campbell, I just said that anonymous is someone I would like to know who that is, but it's usually a fruitless search.

The White House, *Press Briefing by Scott McClellan* (July 23, 2003).

[5] *See Agent's Disclosure Investigated; CIA Has Requested Probe To See If Name Was Illegally Revealed*, Newsday (Sept. 28, 2003) (noting that the CIA request was first reported on September 26, 2003).

The Administration's approach to Mr. O'Neill's alleged actions also appears inconsistent with its policy on providing information to author Bob Woodward for his 2002 book entitled *Bush At War*. According to Mr. Woodward's introduction to the book, *Bush At War* was based in part on "contemporaneous notes taken during more than 50 National Security Council and other meetings where the most important decisions were discussed and made" and "the written record — both classified and unclassified."[6] Mr. Woodward also noted:

> War planning and war making involve secret information. I have used a good deal of it, trying to provide new specific details without harming sensitive operations or relationships with foreign governments. This is not a sanitized version, and the censors, if we had them in the United States — thank God we don't — would no doubt draw the line at a different, more restrictive place than I have.[7]

He also reportedly said that during his research on the book, the President talked with Mr. Woodward in the Oval Office, "often speaking candidly about classified information."[8] The Administration has acknowledged that it provided Mr. Woodward with information for his book.[9]

*Bush at War* portrayed President Bush in a favorable light and there was no apparent Administration investigation regarding Mr. Woodward's statements that he had access to classified information.

A consistent and strict government policy regarding the handling of sensitive information is integral to ensuring public trust in government. For this reason, I am seeking answers to the following questions:

(1) What steps did the White House take regarding an investigation of whether Secretary O'Neill inappropriately disclosed information in January 2004, who took any such steps, and when were any such steps taken? Please describe any White House communications with the Department of the Treasury on this matter before the

---

[6] Bob Woodward, *Bush At War,* xi-xii (2002).

[7] *Id.* at xii.

[8] *Business Expo 2002 — The President Is Religious, Resolute, Woodward Attests*, Providence Journal-Bulletin (Apr. 10, 2002).

[9] Letter from Condoleezza Rice, Assistant to the President for National Security Affairs to Rep. Christopher Shays (June 30, 2003).

Department of the Treasury announced its investigation, the nature of any such communications, and the individuals involved with any such communications.

(2) What steps did the White House take regarding an investigation of whether senior Administration officials inappropriately disclosed information to Robert Novak or others regarding the identity of a covert CIA agent, who took any such steps, and when were any such steps taken? Please describe any White House communications with the Department of Justice on this matter before the September 26, 2003, reports of a Department of the Justice investigation, the nature of any such communications, and the individuals involved with any such communications.

(3) What steps did the White House take regarding an investigation of whether June 2002 media accounts of September 10, 2001, NSA intercepts reflected inappropriate disclosures of sensitive information, who took any such steps, and when were any such steps taken? Please describe any White House communications with members of Congress or their staff before the June 20, 2002, announcement of a congressional request for a Department of Justice investigation, the nature of any such communications, and the individuals involved with any such communications.

(4) What steps did the White House take regarding an investigation of whether Mr. Woodward's statements that he had access to classified information for his book *Bush At War* reflected inappropriate disclosures of sensitive information, who took any such steps, and when were any such steps taken? Please explain the process by which the Administration determines whether it is appropriate to provide journalists with access to classified information.

Your prompt response to these questions can help allay growing concerns about a double standard in the White House. I hope you will agree that on an issue as important as protecting the security of classified information, White House policy should not be driven by political considerations.

Sincerely,

Henry A. Waxman
Ranking Minority Member

**January 24, 2004**

**State Department Memorandum**

**From: Secretary of State, Colin Powell**
**To: Condoleezza Rice**

RE: Applicability of he Geneva Convention to the Conflict n Afghanistan

United States Department of State

*Washington, D.C. 20520*

MEMORANDUM

TO: Counsel to the President
Assistant to the President for National Security Affairs

FROM: Colin L. Powell 26/1

SUBJECT: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan

I appreciate the opportunity to comment on the draft memorandum. I am concerned that the draft does not squarely present to the President the options that are available to him. Nor does it identify the significant pros and cons of each option. I hope that the final memorandum will make clear that the President's choice is between

Option 1: Determine that the Geneva Convention on the treatment of Prisoners of War (GPW) does not apply to the conflict on "failed State" or some other grounds. Announce this position publicly. Treat all detainees consistent with the principles of the GPW;

and

Option 2: Determine that the Geneva Convention does apply to the conflict in Afghanistan, but that members of al Qaeda as a group and the Taliban individually or as a group are not entitled to Prisoner of War status under the Convention. Announce this position publicly. Treat all detainees consistent with the principles of the GPW.

The final memorandum should first tell the President that both options have the following advantages - that is there is no difference between them in these respects:

- Both provide the same practical flexibility in how we treat detainees, including with respect to interrogation and length of the detention.

- Both provide flexibility to provide conditions of detention and trial that take into account constraints such as feasibility under the circumstances and necessary security requirements.

- Both allow us not to give the privileges and benefits of POW status to al Qaeda and Taliban.

- Neither option entails any significant risk of domestic prosecution against U.S. officials.

The memorandum should go on to identify the separate pros and cons of the two options as follows:

**Option 1 - Geneva Convention does not apply to the conflict**

Pros:

- This is an across-the-board approach that on its face provides maximum flexibility, removing any question of case-by-case determination for individuals.

Cons:

- It will reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.

- It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy.

- It will undermine public support among critical allies, making military cooperation more difficult to sustain.

- Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice.

- It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops.

- It will make us more vulnerable to domestic and international legal challenge and deprive us of important legal options:

  - It undermines the President's Military Order by removing an important legal basis for trying the detainees before Military Commissions.

  - We will be challenged in international fora (UN Commission on Human Rights; World Court; etc.).

  - The Geneva Conventions are a more flexible and suitable legal framework than other laws that would arguably apply (customary international human rights, human rights conventions). The GPW permits long-term detention without criminal charges. Even after the President determines hostilities have ended, detention continues if criminal investigations or proceedings are in process. The GPW also provides clear authority for transfer of detainees to third countries.

  - Determining GPW does not apply deprives us of a winning argument to oppose habeas corpus actions in U.S. courts.

**Option 2 - Geneva Convention applies to the conflict**

Pros:

- By providing a more defensible legal framework, it preserves our flexibility under both domestic and international law.

- It provides the strongest legal foundation for what we actually intend to do.

- It presents a positive international posture, preserves U.S. credibility and moral authority by taking the high ground, and puts us in a better position to demand and receive international support.

- It maintains POW status for U.S. forces, reinforces the importance of the Geneva Conventions, and generally supports the U.S. objective of ensuring its forces are accorded protection under the Convention.

- It reduces the incentives for international criminal investigations directed against U.S. officials and troops.

Cons:

- If, for some reason, a case-by-case review is used for Taliban, some may be determined to be entitled to POW status. This would not, however, affect their treatment as a practical matter.

I hope that you can restructure the memorandum along these lines, which it seems to me will give the President a much clearer understanding of the options available to him and their consequences. Quite aside from the need to identify options and their consequences more clearly, in its present form, the draft memorandum is inaccurate or incomplete in several respects. The most important factual errors are identified on the attachment.

## Comments on the Memorandum of January 25, 2002

Purpose

(Second paragraph) The Secretary of State believes that al Qaeda terrorists as a group are not entitled to POW status and that Taliban fighters could be determined not to be POWs either as a group or on a case-by-case basis.

Legal Background

(First bullet) The Memorandum should note that any determination that Afghanistan is a failed state would be contrary to the official U.S. government position. The United States and the international community have consistently held Afghanistan to its treaty obligations and identified it as a party to the Geneva Conventions.

(Second paragraph) The Memorandum should note that the OLC interpretation does not preclude the President from reaching a different conclusion. It should also note that the OLC opinion is likely to be rejected by foreign governments and will not be respected in foreign courts or international tribunals which may assert jurisdiction over the subject matter. It should also note that OLC views are not definitive on the factual questions which are central to its legal conclusions.

Ramifications of Determination that GPW Does Not Apply

(Positive) The Memorandum identifies several positive consequences if the President determines the GPW does not apply. The Memorandum should note that these consequences would result equally if the President determines that the GPW does apply but that the detainees are not entitled to POW status.

(Negative. First bullet) The first sentence is correct as it stands. The second sentence is taken out of context and should be omitted. The U.S. position in Panama was that Common Article 3 of the Geneva Conventions did apply.

Response to Arguments for Applying GPW to the al Qaeda and the Taliban

(First bullet) The assertion in the first sentence is incorrect. The United States has never determined that the GPW did not apply to an armed conflict in which its forces have been engaged. With respect to the third sentence, while no-one anticipated the precise situation that we face, the GPW was intended to cover all types of armed conflict and did not by its terms limit its application.

(Fourth bullet) The point is not clear. If we intend to conform our treatment of the detainees to universally recognized standards, we will be complying with the GPW.




# U.S. Department of Justice
# Office of the Inspector General

## Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act

*(as required by Section 1001(3) of Public Law 107-56)*

January 27, 2004

Section 1001 of the USA PATRIOT Act (Patriot Act), Public Law 107-56, directs the Office of the Inspector General (OIG) in the U.S. Department of Justice (DOJ or Department) to undertake a series of actions related to claims of civil rights or civil liberties violations allegedly committed by DOJ employees. It also requires the OIG to provide semiannual reports to Congress on the implementation of the OIG's responsibilities under Section 1001. This report – the fourth since enactment of the legislation – summarizes the OIG's Section 1001-related activities from June 16, 2003, through December 15, 2003.

## I. INTRODUCTION

The OIG is an independent entity that reports to both the Attorney General and Congress. The OIG's mission is to investigate allegations of waste, fraud, and abuse in DOJ programs and personnel and to promote economy and efficiency in DOJ operations.

The OIG has jurisdiction to review programs and personnel in all DOJ components, including the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Federal Bureau of Prisons (BOP), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the U.S. Attorneys' Offices, and other DOJ components.[1]

The OIG consists of the Immediate Office of the Inspector General and the following divisions and offices:

- **Audit Division** is responsible for independent audits of Department programs, computer systems, and financial statements.

- **Evaluation and Inspections Division** provides an alternative mechanism to traditional audits and investigations to review Department programs and activities.

- **Investigations Division** is responsible for investigating allegations of bribery, fraud, abuse, civil rights violations, and violations of other criminal laws and administrative procedures that govern Department employees, contractors, and grantees.

[1] On March 1, 2003, the Immigration and Naturalization Service (INS) moved from the DOJ to the Department of Homeland Security (DHS). Consequently, the OIG's review of allegations of misconduct involving INS employees – including claims of civil rights and civil liberty abuses – ended in early 2003. If the OIG receives allegations involving immigration-related issues, including complaints about abuse of civil rights or civil liberties by employees of the former INS, we now forward the complaints to the DHS OIG.

- **Office of Oversight and Review** blends the skills of attorneys, investigators, and program analysts to investigate or review high profile or sensitive matters involving Department programs or employees.

- **Office of General Counsel** provides legal advice to OIG management and staff. In addition, the office drafts memoranda on issues of law; prepares administrative subpoenas; represents the OIG in personnel, contractual, and legal matters; and responds to Freedom of Information Act requests.

- **Management and Planning Division** assists the OIG by providing services in the areas of planning, budget, finance, personnel, training, procurement, automated data processing, computer network communications, and general support.

The OIG has a staff of approximately 400 employees, about half of whom are based in Washington, D.C., while the rest work from 16 Investigations Division field and area offices and 7 Audit Division regional offices located throughout the country.

## II. SECTION 1001 OF THE PATRIOT ACT

Section 1001 of the Patriot Act provides the following:

> The Inspector General of the Department of Justice shall designate one official who shall -
>
> (1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice;
>
> (2) make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official; and
>
> (3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraph (1), including a description of the use of funds appropriations used to carry out this subsection.

## III. CIVIL RIGHTS AND CIVIL LIBERTIES COMPLAINTS

*Review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice.*

The OIG established the Special Operations Branch in its Investigations Division to help manage the OIG's investigative responsibilities outlined in Section 1001.[2] The Special Agent in Charge (SAC) who directs this unit is assisted by two Assistant Special Agents in Charge (ASAC), one of whom assists on Section 1001 and DEA matters and a second who assists on FBI matters. In addition, two Investigative Specialists support the unit and divide their time between Section 1001 and FBI/DEA responsibilities.

The OIG receives civil rights and civil liberties complaints via mail, e-mail, telephone, and facsimile. The complaints initially are reviewed by the Investigative Specialist and ASAC responsible for Section 1001 matters. After review, the complaint is entered into the OIG's investigations database and a decision is made concerning its disposition.

One of the initial determinations is whether a complaint alleges the type of abuse of civil rights and civil liberties contemplated by Section 1001 of the Patriot Act. While the phrase "civil rights and civil liberties" is not specifically defined in the Patriot Act, the OIG has looked to the "Sense of Congress" provisions in the statute, namely Sections 102 and 1002, for context. Sections 102 and 1002 identify certain ethnic and religious groups who would be vulnerable to abuse due to a possible backlash from the terrorist attacks of September 11, 2001, including Muslims, Arabs, Sikhs, and South Asians.

The more serious civil rights and civil liberties allegations that relate to actions of a DOJ employee or DOJ contractor are generally assigned to an OIG Investigations Division field office for investigation by OIG special agents. Other complaints are assigned to the OIG's Office of Oversight and Review for investigation.

Given the number of complaints and its limited resources, the OIG does not investigate all allegations made against DOJ employees. The OIG refers for appropriate handling many complaints involving DOJ employees to internal affairs offices in DOJ components, such as the FBI Office of Professional Responsibility, the DEA Office of Professional Responsibility, and the BOP Office of Internal Affairs. In certain referrals, the OIG requires the components to report the results of its investigations to the OIG. In most cases, the OIG

[2] This unit also is responsible for coordinating the OIG's review of allegations of misconduct by employees in the FBI and the DEA.

notifies the complainant of the referral.

Many complaints involve matters outside the OIG's jurisdiction because they involve issues regarding non-DOJ employees. Complaints that identify a specific issue for investigation are forwarded to the appropriate investigative entity. For example, complaints of mistreatment by airport security staff are sent to the DHS OIG. We also have forwarded complaints to the OIG at the Department of Housing and Urban Development, Department of State, and the Social Security Administration. In addition, we have referred complainants to a variety of police department internal affairs offices who have jurisdiction over the subject of the complaints.

When an allegation received from any source involves a potential violation of federal civil rights statutes by a DOJ employee, OIG staff discusses the complaint with the DOJ Civil Rights Division for possible prosecution. In some cases, the Civil Rights Division accepts the case and requests additional investigation by either the OIG or the FBI. In other cases, the Civil Rights Division declines prosecution. Even in the event of a declination, the OIG may continue investigating the complaint as an administrative matter. [3]

### A. Complaints Processed this Reporting Period

From June 14, 2003, through December 15, 2003, the period covered by this report, the OIG processed the following number and types of complaints:

- Number of complaints processed suggesting a Section 1001-related civil rights or civil liberties connection:[4] 1,266

- Number of "unrelated" complaints:[5] 720

[3] The OIG can pursue an allegation either criminally or administratively. Many OIG investigations begin with allegations of criminal activity but, as is the case for any law enforcement agency, do not end in prosecution. When this occurs, the OIG is able to continue the investigation and treat the matter as a case for potential administrative discipline. The OIG's ability to handle matters criminally or administratively helps to ensure that a matter can be pursued administratively, even if a prosecutor declines to prosecute a matter criminally.

[4] This number includes all complaints in which the complainant makes any mention of a Section 1001-related civil rights or civil liberties violation, even if the allegation is not within the OIG's or the DOJ's jurisdiction.

[5] Complaints in this category cite no improper act by a DOJ employee or contractor or no discernible nexus between the alleged conduct of the DOJ employee/contractor to any Section 1001-related civil rights or civil liberties violation. Examples of this category include complaints that the government is broadcasting harmful electronic signals to individuals, claims that the government is intercepting dreams, and allegations that the government is using subliminal messages to force people to engage in certain acts.

- Number of complaints outside the OIG's jurisdiction:[6] 384
- Number of complaints within the OIG's jurisdiction: 162
- Number of complaints within the OIG's jurisdiction in which the OIG or another internal affairs office within a DOJ component opened an investigation or conducted a closer review: 17

The 162 complaints processed by the OIG during this reporting period that fell within the OIG's jurisdiction (i.e., that state a claim involving a DOJ component or employee) covered a wide variety of subjects. They included allegations of excessive force and verbal abuse by BOP correctional officers, unwarranted cell searches by BOP staff, retaliatory actions by BOP employees, illegal searches of property and fabrication of evidence by FBI agents, and the failure of the FBI to initiate investigations.

However, many of the 162 complaints in this category, while within the OIG's jurisdiction and couched as a "civil rights" complaint, did not raise issues implicated by our duties under Section 1001. For example, the OIG received numerous complaints from inmates alleging that they have not received appropriate medical care or were given food that violated their religious dietary restrictions.

None of the 162 matters involved complaints alleging misconduct by DOJ employees related to their use of a substantive provision in the Patriot Act.

After closely analyzing the complaints in this category, the OIG identified 17 matters that warranted opening an investigation or conducting a closer review. These complaints, which varied in seriousness, included allegations of excessive force against BOP inmates, verbal abuse of inmates, denying inmates access to the law library and telephone calls, unreasonable prison cell searches, and placement in solitary confinement for no apparent reason.

[6] These complaints generally cite issues that involve other federal agencies, state governments, local law enforcement agencies, or private businesses. Examples include allegations that local law enforcement officers used excessive force or entered a home without a search warrant; allegations of retaliation, unfair labor practices, discrimination, or other civil rights violations by federal agencies outside the DOJ; or allegations of rude treatment by INS or airport inspectors. We refer these complaints to the appropriate entity.

## B. Section 1001 Cases this Reporting Period

### 1. Complaints Investigated by the OIG

#### a. New matters

During this reporting period, the OIG opened two new Section 1001-related investigations, continued eight ongoing Section 1001-related cases, and closed four Section 1001 investigations. The two new matters opened by the OIG alleging Section 1001-related civil rights and civil liberties abuses by DOJ employees during this reporting period are:

- The OIG is investigating allegations raised by a Muslim inmate that he was subjected to verbal abuse, discrimination, and anti-Islamic sentiment that has intensified since September 11, 2001. The inmate also complained he was transferred to another BOP facility in retaliation for filing complaints against BOP correctional officers.

- The OIG opened a preliminary inquiry into allegations received from an individual who alleged that he was abused by FBI agents and INS detention officers from his arrest in March 2002 until he was deported in April 2002.

#### b. Examples of cases opened during the previous reporting periods that the OIG has continued to investigate

- The OIG is investigating claims by an Egyptian national that the FBI improperly arrested and detained him immediately following the September 11 attacks and that during his detention his civil rights and civil liberties were violated. According to the Egyptian national, while held at a BOP facility he was forced to undergo an invasive body cavity search in the presence of numerous people, including a woman. To date, the OIG interviewed the Egyptian national and approximately 50 BOP employees who had contact with the detainee during his detention.

- The OIG is investigating claims that a BOP correctional officer verbally and physically abused an inmate while he was being transported to the prison's hospital and that the inmate was placed in solitary confinement after the incident. This case has been referred to the Civil Rights Division for prosecutive decision.

- The OIG investigated allegations that FBI agents conducted an illegal search of an Arab-American's apartment and during the search they vandalized the apartment, stole items, and called the complainant a

terrorist. According to the complainant, even though the FBI found no evidence linking him to terrorism, approximately four months later the FBI recruited an acquaintance of his to plant drugs in the complainant's home. FBI agents then arrived at the complainant's home and conducted a consent search and arrested the complainant after finding drugs. During the complainant's interview by the OIG, however, he admitted that the cocaine discovered could have been his and that he did not believe the FBI was involved in planting evidence. The OIG has completed its review of this matter and is drafting its report of investigation.

- The OIG is investigating allegations that Muslim inmates at a BOP facility have been targeted for disciplinary actions and subjected to disparate treatment by correctional officers. Specifically, the complainant alleges that certain members of the facility's staff take retaliatory actions against the Muslim inmates on a regular basis.

- The OIG is investigating allegations that unidentified correctional officers and the warden of a BOP facility threatened to "gas" inmates subsequent to the September 11 attacks. It was further alleged that these unidentified correctional officers and the warden have retaliated against the inmate complainant for making the allegations. The OIG is drafting its report of investigation.

- The OIG is investigating allegations that a detainee was assaulted at an INS contract facility. The detainee was involved in a verbal exchange with a correctional officer and allegedly was struck in the eye, pushed to the floor, and sprayed with pepper spray. The following day, the detainee was taken to a local hospital emergency room for treatment. The detainee suffered a black eye and back pain. The detainee has since been deported from the United States.[7]

### c. OIG investigations closed during this reporting period

- The OIG investigated claims that an INS Supervisory Detention Enforcement Officer (SDEO) entered a gas station operated by an Arab-American and demanded paper towels. When the attendant replied that he did not have paper towels, the SDEO displayed his credentials, asked the attendant if he was American, and requested his immigration documents. The investigation also revealed that the SDEO requested a colleague to query an immigration database for information on the attendant. Our investigation concluded that the SDEO improperly displayed his credentials for other than official purposes and

[7] The OIG began this investigation before INS was moved from the Department to the DHS and retained the matter after the transfer in order to complete the investigation.

inappropriately caused an INS database to be queried. We provided our report of investigation to the DHS for appropriate action.

- The OIG investigated allegations that a BOP correctional officer used excessive force and failed to follow BOP policy in handling and restraining a Muslim inmate when the inmate was removed from his cell to be escorted to the Medical Unit for examination. The investigation did not reveal sufficient evidence to conclude that the correctional officer used excessive force to restrain the inmate. However, the OIG concluded that the correctional officer used poor judgment in handling the inmate and failed to follow BOP policy when the correctional officer immediately entered the inmate's cell and used force to subdue the inmate instead of waiting for assistance and preparing a plan for a safer entry into the cell. The OIG provided its findings to the BOP for appropriate action.

- During the previous reporting period, the OIG opened an investigation based on allegations raised by approximately 20 inmates that a BOP correctional officer verbally abused inmates with ethnic and racial slurs and inappropriate comments. After the BOP facility's investigation concluded that the allegations were unsubstantiated, BOP's Office of Internal Affairs (OIA) referred the matter to the OIG. When the OIG interviewed the correctional officer, he admitted to not being completely candid with the investigators, to verbally abusing the Muslim inmate, and to throwing the inmate's Koran into the trashcan. The OIG provided its findings to the BOP for appropriate action.

- The OIG investigated allegations that an INS detention enforcement officer held a loaded gun to a detainee's head and threatened the detainee while transferring him to another detention facility. The OIG interviewed the detainee and the two detention enforcement officers who were transporting the detainee but could not substantiate the allegations due to conflicting accounts.

### 2. Complaints Referred to Other Components

During this reporting period, 15 of the 17 complaints were referred to internal affairs offices within DOJ components for investigation or for closer review. One of the 15 complaints was referred to the FBI. The complainant in that matter alleged that he was inappropriately subjected to surveillance by the FBI. The FBI determined that the allegation was without merit and closed the matter.

Fourteen of the 15 complaints were referred to the BOP this reporting period. They included allegations that BOP staff used excessive force and

verbally abused Muslim inmates; ignored requests for medical treatment; executed excessive searches of Muslim inmates' cells because of their religious beliefs; and denied Muslim inmates access to television, radio, books, and newspapers.

The 14 complaints sent to the BOP were designated by the OIG as "Monitored Referrals," which means that the BOP is required at the end of its investigation to send a report of the investigation to the OIG for its review. Of the 14 complaints, the BOP closed five matters during the reporting period, while nine matters remain open. The BOP closed four of the five as unsubstantiated and the fifth because the subject was terminated from his position as a correctional officer during his probationary period.

In our previous Section 1001 report, we described a complaint that was sent to the DEA alleging that DEA agents conducted an illegal search of an Arab-American's home and confiscated the family's passports and personal property, even though nothing illegal was found during the search. DEA OPR conducted an investigation of this matter and determined the allegations were unsubstantiated. The investigation also revealed that the complainant was charged by the DEA in connection with a drug investigation and is currently a fugitive from justice.

### C. Other OIG Activities Related to Allegations of Civil Rights and Civil Liberties Abuses

The OIG has conducted activities that go beyond the explicit requirements of Section 1001 in order to more fully implement its civil rights and civil liberties responsibilities. Given the multi-disciplinary nature of its workforce, the OIG can extend its oversight beyond traditional investigations to include evaluations, audits, and special reviews of DOJ programs and personnel. Using this approach, the OIG has conducted several special reviews, including an in-depth inquiry into allegations that aliens detained in connection with the investigation of the September 11 attacks were physically and verbally abused by some correctional officers at the Metropolitan Detention Center in Brooklyn, New York.

#### 1. Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York

On December 18, 2003, the OIG issued a report that examined in detail allegations made by detainees held in connection with the Department's terrorism investigation that some correctional staff members at the Metropolitan Detention Center (MDC) physically and verbally abused detainees. The report supplemented a comprehensive review released by the OIG in June 2003 that examined how the Department handled 762 detainees held on

immigration charges in connection with the investigation of the terrorist attacks, including their processing, their bond decisions, the timing of their removal from the United States, their access to counsel, and the conditions of their confinement.[8]

In Chapter 7 of the Detainee Report, the OIG described the treatment of the September 11 detainees at the MDC and concluded that the conditions were excessively restrictive and unduly harsh. We also concluded that evidence showed some MDC correctional officers physically and verbally abused some detainees, particularly during the months immediately following the September 11 attacks. However, we noted in the Detainee Report that while federal prosecutors had declined criminal prosecution in this matter, the OIG's administrative investigation of physical and verbal abuse at the MDC was still ongoing.

The December 2003 Supplemental Report details our findings and conclusions from this supplemental review. We concluded that certain MDC staff members did abuse some of the detainees. We did not find evidence that the detainees were brutally beaten, but we found evidence that some officers slammed and bounced detainees against the wall, twisted their arms and hands in painful ways, stepped on their leg restraint chains, and punished the detainees by keeping them restrained for long periods of time. We concluded that the way these MDC staff members handled detainees was, in many respects, unprofessional, inappropriate, and in violation of BOP policy.

In addition, we found systemic problems in the way detainees were treated at the MDC, including staff members' use of a t-shirt taped to the wall in the facility's receiving area designed to send an inappropriate message to detainees, audio taping of detainees meetings with their attorneys, unnecessary and inappropriate use of strip searches, and banging on detainees' cell doors excessively while they were sleeping.

During our investigation, we examined approximately 30 detainees' allegations of physical and verbal abuse against approximately 20 MDC staff members. In our review of these allegations, we interviewed more than 115 individuals, including detainees, MDC staff members, and others. The staff members primarily were correctional officers who had been assigned to the Administrative Maximum Special Housing Unit or ADMAX SHU, the high-security wing of the MDC that housed the September 11 detainees, or staff members who were involved in escorting the detainees on and off the ADMAX SHU.

[8] "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" ("Detainee Report"), issued June 2, 2003. On June 25, 2003, the Inspector General testified before the U.S. Senate Committee on the Judiciary regarding the Detainee Report.

We also reviewed MDC videotapes, including hundreds of tapes showing detainees being moved around the facility and tapes from cameras in detainees' cells. During the course of our investigation, MDC officials repeatedly told us that videotapes of general detainee movements no longer existed. That information was inaccurate. In late August 2003, the OIG discovered more than 300 videotapes at the MDC spanning the period from October through November 2001.

The OIG developed evidence that approximately 16 to 20 MDC staff members, most of whom were assigned to the ADMAX SHU, violated BOP policy by physically or verbally abusing detainees. We considered "physical abuse" to be the handling of the detainees in ways that physically hurt or injured them without serving any correctional purpose. Similarly, we considered "verbal abuse" to be insults, coarse language, and threats to physically harm or inappropriately punish detainees, all of which violate BOP policies.

For example, the videotapes showed compliant detainees being slammed or rammed against the wall, pressed by their heads or necks, and having their fingers or hands twisted, despite officers' denials that this ever occurred and despite statements by senior BOP officials that such actions were not appropriate. The videotapes also confirm that officers placed detainees against an American flag t-shirt with the phrase "These colors don't run," which was taped to the wall in the sally port area where detainees first arrived at the MDC. This t-shirt remained in place for many months, despite officers' denials of its existence or claims that it was removed after a short period of time.

Moreover, the videotapes showed that some MDC staff members misused strip searches and restraints to punish detainees and revealed that officers improperly recorded detainees' meetings with their attorneys.

We provided the results of our investigation to managers at BOP Headquarters for their review and appropriate disciplinary action. In the report to the BOP, we included an Appendix identifying current and former staff members who we believe committed misconduct, and we describe the specific evidence against them. In the Appendix, we also described allegations against specific officers that we did not substantiate. It is important to note that these allegations were not against all staff members at the MDC, and that many MDC officers performed their duties in a professional manner under difficult circumstances in the aftermath of the September 11 terrorist attacks.

In the Appendix (which was not released publicly because of privacy interests and the ongoing consideration of discipline against specific officers), we recommend that the BOP take disciplinary action against 10 current BOP employees, counsel 2 current MDC employees, and inform employers of 4 former MDC staff members about our findings against them.

In the report, we made seven recommendations to the BOP, ranging from developing guidance to train correctional officers in appropriate restraint techniques to educating BOP staff concerning the impropriety of audio recording meetings between inmates and their attorneys.

### 2. Analysis of Responses to Recommendations in Detainee Report

In Chapter 9 of the Detainee Report, the OIG made 21 recommendations related to issues under the jurisdiction of the FBI, the BOP, leadership offices at the DOJ, as well as immigration issues now under the jurisdiction of DHS. During the reporting period, the OIG analyzed two sets of responses from the Department to our recommendations in the Detainee Report and one set from the DHS.

The OIG received written responses to the 21 recommendations from the Deputy Attorney General on behalf of the DOJ on July 21, 2003, and from the Under Secretary for Border and Transportation Security on behalf of the DHS on August 4, 2003. On September 5, 2003, we issued an analysis of the responses of both the DOJ and the DHS. The OIG's analysis concluded that both agencies appeared to be taking the recommendations seriously and were taking steps to address many of the concerns raised by the Detainee Report. The OIG's analysis concluded, however, that many of the recommendations were not addressed with sufficient specificity and significant work remained before the recommendations were fully implemented. For several of the recommendations, the OIG requested additional information regarding the DOJ's proposed action to address the recommendations.

On November 20, 2003, the DOJ submitted to the OIG a second response to the recommendations that related to issues under the DOJ's jurisdiction. The DOJ's second response provided additional information and an update on the steps that the DOJ and its components were taking to implement the OIG's recommendations. The second response also included three attachments from the BOP describing policies it had adopted to address the OIG's recommendations.

The OIG analyzed the DOJ's second response and in a report issued on January 6, 2004, concluded that the DOJ has taken significant and responsible steps to implement the OIG's recommendations. For example:

- The OIG had recommended that the FBI develop clearer and more objective criteria to guide its classification decisions in future cases involving mass arrests of illegal aliens in connection with terrorism investigations. The DOJ's second response described how decisions will be made to determine whether someone is "of interest" to the FBI, and

also described a protocol on how that decision will be made. In making its initial decision, the FBI stated that it will rely on information from a variety of sources, including the Terrorist Threat Integration Center and the Terrorist Screening Center.

- The OIG had recommended that the FBI should provide the DHS and BOP with a written assessment of an alien's likely association with terrorism shortly after an arrest, preferably within 24 hours. The DOJ agreed with our recommendation to provide an assessment of an alien's suspected association with terrorism "as expeditiously as possible." It stated that it may not be possible to do so within 24 hours in all cases, but said if the initial statement of interest is oral, the FBI will provide a written statement as soon as possible thereafter.

- Given the highly restrictive conditions under which the BOP housed some of its September 11 detainees, and the slow pace of the FBI's clearance process, we had recommended that the BOP consider requiring written assessments from immigration authorities and the FBI prior to placing aliens arrested solely on immigration charges into highly restrictive conditions of confinement. Absent such a particularized assessment from the FBI and immigration authorities, we recommended that the BOP apply its traditional inmate classification procedures to determine the level of secure confinement required by each detainee. The DOJ response stated that the FBI will provide either a verbal or written statement to the BOP and DHS as to their interest in a detainee. The response further provided that in the absence of this statement, the BOP will apply its traditional inmate classification procedures to determine the level of secure confinement required by each detainee.

- The OIG had recommended that the BOP issue new procedures requiring that videotapes of detainees with alleged ties to terrorism who are housed in high security areas be retained for longer than the 30 days that was required at the time our Detainee Report was issued. The DOJ response described a new BOP policy that requires staff to retain for six months videotapes that depict routine inmate movements outside cells and BOP officers' entrances into the cells of inmates who are confined pursuant to national emergencies.

Because immigration enforcement responsibilities have been transferred from the DOJ to the DHS, the DHS OIG is now responsible for monitoring the DHS's implementation of the recommendations contained in the Detainee Report relating to immigration issues.

### 3. Review of the BOP's Process for Selecting Muslim Clerics

The OIG is examining the procedures used by the BOP to select Muslim personnel, contractors, and volunteers who provide religious services to inmates. We initiated this review in response to a request from a U.S. Senator expressing concern that the BOP relies solely on two organizations that allegedly have connections to terrorism to endorse Muslim cleric candidates as qualified religious leaders. The OIG review is examining whether the BOP's process for selecting Muslim religious service providers effectively screens candidates to ensure that extremist groups do not become religious service providers in the BOP.

### 4. Review of the FBI's Implementation of Attorney General Guidelines

In May 2002, the Attorney General issued revised domestic Guidelines that govern general crimes and criminal intelligence investigations. In May 2003, approximately one year after the revised Guidelines had been in effect, the OIG began a review of the FBI's implementation of the four sets of Guidelines: Attorney General's Guidelines Regarding the Use of Confidential Informants; Attorney General's Guidelines on FBI Undercover Operations; Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations; and Revised Department of Justice Procedures for Lawful, Warrantless Monitoring of Verbal Communications.

The objectives of the OIG review are to determine what steps the FBI has taken to implement the Guidelines, examine how effective those steps have been, and assess the FBI's compliance with key provisions of the Guidelines. Because the FBI's adherence to these Guidelines could implicate civil rights or civil liberties issues under Section 1001, we are including a description of this review in our report.

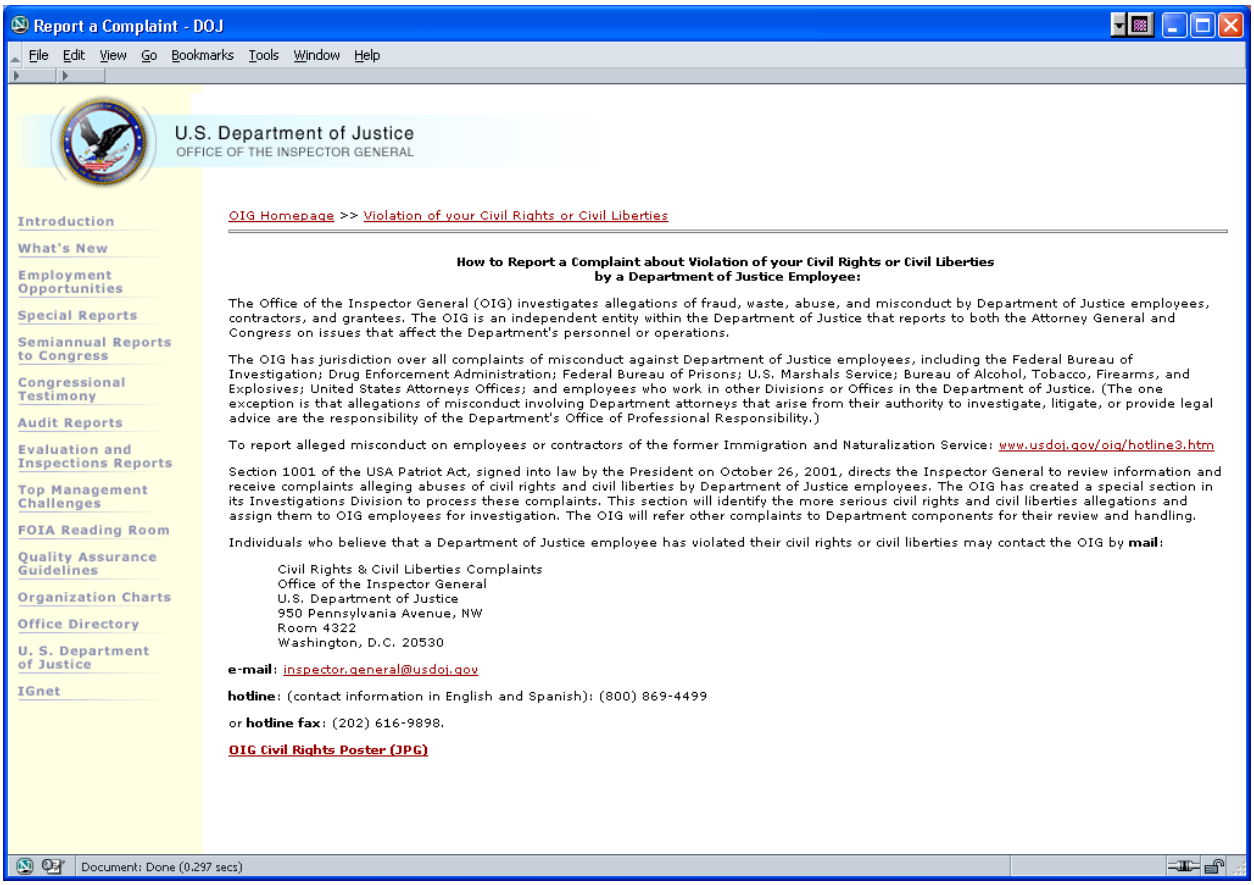
## IV. ADVERTISING RESPONSIBILITIES

*Make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official.*

The OIG continues to meet its Section 1001 advertising requirements in a variety of ways.

## A. Internet

The OIG's website contains information about how individuals can report violations of their civil rights or civil liberties. The OIG also continues to promote an e-mail address – inspector.general@usdoj.gov – where individuals can send complaints of civil rights and civil liberties violations.




The OIG previously developed a poster, translated in Arabic, that explains how to file a civil rights or civil liberties complaint with the OIG. An electronic version of this poster is available on our website.

The DOJ's main Internet homepage contains a link that provides a variety of options for reporting civil rights and civil liberties violations to the OIG. The Civil Rights Division's website also describes the OIG's role in investigating allegations of misconduct by DOJ employees and provides information on how to file a complaint with the OIG.

In addition, several minority and ethnic organizations have added information to their websites about how to contact the OIG with civil rights and civil liberties complaints. For example, the Arab American Institute

(www.aaiusa.org), an organization that represents Arab Americans' interests and provides community services, added the OIG's Section 1001 poster to its website of information and resources for the Arab American community. The Institute also has informed its members and affiliates of the OIG's Section 1001 responsibilities through its weekly e-mail newsletter. Similarly, the American-Arab Anti-Discrimination Committee (ADC), one of the largest Arab American organizations in the nation, has posted the OIG's contact information and Section 1001 responsibilities on its website, which at one time averaged more than 1 million hits per month. The ADC also has published the OIG's Section 1001 responsibilities in its magazine, the *ADC Times*, which is circulated to more than 20,000 people. Furthermore, the OIG's Arabic poster and Section 1001 responsibilities have been disseminated electronically by the Council on American Islamic Relations LISTERV and the National Association of Muslim Lawyers LISTSERV.

### B. Television

During this reporting period, the OIG arranged to have the following television advertisement aired with the text spoken in Arabic and scrolled in English:

*The Office of the Inspector General investigates allegations of civil rights and civil liberties abuses by U.S. Department of Justice employees. If you believe a Department of Justice employee has violated your civil rights or civil liberties, contact the Inspector General at 800-869-4499. That number again is 800-869-4499.*

The OIG purchased blocks of time on ANA Television Network, Inc., an Arab cable television station with outlets around the country. According to the promotional materials, ANA Television Network is the largest Arab-American television network in the country and broadcasts news and entertainment 24 hours a day. The segment was aired 48 times, during prime time, from June 5, 2003, through July 22, 2003.

### C. Radio

During the reporting period, the OIG submitted public service announcements to 45 radio stations in cities across the country, including New York, Los Angeles, Sacramento, Chicago, Detroit, Houston, Dallas, and Washington, D.C. The text of the PSA read:

*The Office of the Inspector General investigates allegations of civil rights and civil liberties abuses by U.S. Department of Justice employees. If you believe a Department of Justice employee has violated your civil rights or civil liberties, contact the Inspector General at 800-869-4499.*

We also purchased airtime for 44 radio advertisements on Arab/Muslim American radio stations in New York, Chicago, Los Angeles, Detroit, and Dallas. These advertisements, which ran in late 2003, were 60 seconds long and included the same script listed above both in English and Arabic.

### D. Posters

Previously, the OIG disseminated approximately 2,500 Section 1001 posters to more than 150 organizations in 50 cities. The posters, in English and Arabic, explain how to contact the OIG to report civil rights and civil liberties abuses.

In an earlier reporting period, we also provided the posters to the BOP, which has placed at least two in each of its facilities. In addition, we had provided approximately 400 posters to INS officials prior to the agency's transfer from the DOJ for distribution to its offices across the country. If the posters generate complaints about immigration officials, as of March 1, 2003, we have forwarded these allegations to the DHS OIG.




### E. Newspapers

The OIG is making arrangements to purchase a second round of advertisements in one newspaper highlighting its role in investigating allegations of civil rights and civil liberties abuses. This time, the display

advertisements will be placed in an Arab community newspaper. Advertisements will appear both in English and Arabic.

### F. Flyers

With the assistance of the FBI's Language Services Department, the OIG developed flyers in Urdu and Punjabi, which after Arabic are the two most commonly spoken Arab languages. Flyers also were translated into Spanish and Vietnamese, and the FBI is preparing a translation into Indonesian. These flyers will be distributed to organizations that work with the respective communities to inform them of the OIG's Section 1001 responsibilities. In addition, we intend to provide all the flyers to the BOP and request that they be made available to incoming inmates in their native languages.

# ਰਿਪੋਟ
# ਸ਼ਕਸੀ ਅਜ਼ਾਦੀ ਦੇ ਵਿਰੁਧ ਵਿਤਕੇ।

# REPORT
# CIVIL RIGHTS & CIVIL LIBERTIES ABUSES

ਅਮਰੀਕਾ ਦਾ ਇਨਸਾਫ ਵਿਭਾਗ ਅਤੇ ਇੰਸਪੈਕਟਰ ਜਨਰਲ ਦਾ ਦਫਤਰ (OIG) ਲੋਕਾਂ ਦੇ ਮਾਨਵ ਅਧਿਕਾਰ ਅਤੇ ਮਾਨਵ ਅਧਿਕਾਰ ਉਤੇ ਕੀਤੀਆ ਗਈਆ ਬੇਇਨਸਾਫੀਆ ਦੀ ਤਹਕੀਕਾਤ ਕਰਦਾ ਹੈ। ਇਨਾ ਬੇਇਨਸਾਫੀਆ ਦਾ ਤਹਕੀਕਾਤ ਇਨਸਾਫ ਵਿਭਾਗ, ਐ.ਬੀ.ਆਈ. , ਡੀ.ਈ.ਅ. ਉਤੇ ਆਈ. ਐਨ. ਐਸ. ਫੈਡਰਲ ਜੇਲ ਵਿਭਾਗ, ਅਮਰੀਕਾ ਦੀ ਮਾਰਸ਼ਲ ਸੇਵਾ, ਅਮਰੀਕਨ ਵਕਾਲਤ ਦੇ ਦਫਤਰ ਅਤੇ ਹੋਰ ਸਾਰੇ ਇਨਸਾਫ ਵਿਭਗਾਂ ਦੇ ਮੁਲਾਜ਼ਮਾ ਅਤੇ ਅਧਿਕਾਰੀਆਂ ਦੀ ਕੀਤੀ ਜਾਂਦੀ ਹੈ।

ਅਗਰ ਤੁਹਾਨੂ ਯਕੀਨ ਹੈ ਕੀ ਤੁਹਾਡੇ ਨਾਲ ਕਿਸੀ ਇਨਸਾਫ ਵਿਭਾਗ ਦੇ ਮੁਲਾਜ਼ਮ ਨੇ ਬੇਇਨਸਾਫੀ ਕੀਤੀ ਹੈ, ਤੁਸੀ ਅਪਨੀ ਸ਼ਿਕਾਯਤ ਓ. ਆਈ. ਜੀ. ਦੇ ਦਫਤਰ ਨੂ ਇਸ ਪਤੇ ਤੇ ਭੇਜੋ।

ਚਿਠੀ ਭੇਜਣ ਦਾ ਪਤਾ

mail: Civil Rights & Civil Liberties Complaints
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

e-mail: inspector.general@usdoj.gov

or fax: (202) 616-9898

***For more information, call (800) 869-4499 or visit the OIG's website at www.usdoj.gov/oig***

The Office of the Inspector General (OIG), U.S. Department of Justice, investigates allegations of civil rights and civil liberties abuses by Department of Justice employees in the FBI, DEA, ATF, Federal Bureau of Prisons, U.S. Marshals Service, U.S. Attorneys Offices, and all other Department of Justice agencies.

**If you believe a Department of Justice employee has violated your civil rights or civil liberties, you may file a complaint with the OIG by:**

mail: Civil Rights & Civil Liberties Complaints
Office of the Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

e-mail: inspector.general@usdoj.gov

or fax: (202) 616-9898

***For more information, call (800) 869-4499 or visit the OIG's website at www.usdoj.gov/oig***

## V. ADDITIONAL OUTREACH AND TRAINING EFFORT

In addition to media advertisements, the OIG is reaching out in other ways to educate the public and its own employees about its Section 1001 responsibilities. For example, on June 26, 2003, an OIG Special Agent in Charge attended training sponsored by the DOJ's Community Relations Service entitled "*Building Cultural Competency: Arab, Muslim and Sikh Americans.*" This day-long program was designed to assist the attendees to understand cultural issues relating to the Arab, Muslim, and Sikh communities in the United States and to provide guidance for training others.

We are also developing a guide in question/answer format to assist individuals in understanding the OIG's Section 1001 responsibilities, our jurisdiction, and how to make a complaint. This guide will be posted on the OIG's website.

## VI. EXPENSE OF IMPLEMENTING SECTION 1001

> *Submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report…including a description of the use of funds appropriations used to carry out this subsection.*

During this reporting period, the OIG spent approximately $415,000 in personnel costs, $13,400 in travel costs, and $8,000 in advertising and publication costs, for a total of more than $436,500 to implement its responsibilities under Section 1001. The personnel and travel costs reflect the time and funds spent by OIG Special Agents, inspectors, and attorneys who have worked directly on investigating Section 1001-related complaints and special reviews.

February 3, 2004

From: Representatives Henry A. Waxman, John D. Dingell, Charkles B. Rangel

To: Secretary of Health and Human Services, Tommy Thompson

RE: Chief Actuary for the Health Care Financing Administration, Richard S. Foster's Accusations of Suppressed Medicare Medicaid cost Figures

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Congress of the United States
House of Representatives
Washington, D.C. 20515

February 3, 2004

The Honorable Tommy G. Thompson
Secretary of Health and Human Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Mr. Secretary:

We are writing to you regarding the recent news that the Administration estimates that the Medicare prescription drug bill signed into law in December will cost more $534 billion over the next ten years — $134 billion more than estimated by the Congressional Budget Office at the time of passage. In particular, we are concerned about reports that although the Administration knew of these estimates well before passage of the legislation, this news was withheld from Congress and the public until just last week.

The President indicated on January 30, 2004, that he learned of the new estimate of the costs of the drug benefit only two weeks ago.[1] But recent press accounts suggest that the Administration was aware of these costs well before Congress passed the legislation. The *Washington Post* reported that "administration officials had indications for months that the new Medicare prescription drug law might cost considerably more than the $400 billion advertised by the White House and Congress."[2] According to the *New York Times*, Tom Scully, who was Administrator of the Center for Medicare and Medicaid Services (CMS) when the bill was passed, said, "the [cost] estimate may be surprising to some people, but it's not shocking to me."[3]

Yesterday, the *New York Times* reported that "the administration now says the actuaries' cost estimates have been over $500 billion since last summer."[4] The article also quotes you as saying that "Congressional staff knew our actuarial numbers . . . There was no attempt to keep

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[1] *Bush Says He's Undaunted by Drug Costs*, New York Times (Jan. 31, 2004); *White House Brushes Aside Criticism over Medicare Plan*, Los Angeles Times (Jan. 31, 2004).

[2] *Higher Medicare Costs Suspected for Months*, Washington Post (Jan. 31, 2004).

[3] *White House Defends Medicare Law Despite Higher Price Tag*, New York Times (Jan. 30, 2004).

[4] *White House Now Says Congress Underestimated New Medicare Costs*, New York Times (Feb. 2, 2004).

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CORRESPONDENCE
CONTROL CENTER



our number camouflaged."[5] While we have no knowledge of what you communicated to Republican staff, we can say categorically that this information was not communicated to us or our staff. Moreover, you and other administration officials continued to state publicly that the legislation would cost only $400 billion when Congress was voting on the legislation.[6]

The new cost estimate for the final bill has critical implications. If the Administration's new higher estimate is correct, the limited prescription drug benefit, which was crafted by the White House and Republican leaders, will now have a far higher price tag for its meager services than previously estimated. And the federal budget deficit, which was already anticipated to reach record levels, will now be even larger than expected.

Moreover, critical parts of the Medicare program, not just the prescription drug provisions, could be put at risk. The $134 billion in additional costs could trigger a little-noticed provision of the Medicare law, potentially causing significant cutbacks in the drug benefit and Medicare payments to physicians and clinics.[7] Under this provision, if the costs of Medicare Part B (physician and outpatient services) and Medicare Part D (the new drug benefit) exceed 45% of total Medicare costs in any two-year period, Congress must consider legislation under expedited procedures to cut funding for the drug benefit or physician payments or both.

Congress and the public should know what the Administration knew about the costs of the prescription drug benefit and when the Administration knew it. For this reason, we request that you provide us with all estimates of the costs of adding a new prescription drug benefit to Medicare and cost estimates and other analyses (e.g., plan and beneficiary participation) for legislation to increase the presence of HMO and other private plans under Medicare that have been prepared since January 1, 2003, by the HHS Office of the Actuary. This information should include any estimates by the Office of the Actuary of the costs of:

(1) S. 1, the legislation passed by the Senate;

(2) H.R. 1, the legislation passed by the House;

(3) Versions of the final legislation that were under consideration by the conference committee appointed after Senate passage of S. 1 and House passage of H.R. 1; and

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[5] *Id.*

[6] See, e.g., Tommy G. Thompson, *Fox News Special Report with Britt Hume* (Nov. 24, 2003); Tom Scully, *The Medicare Bill: A Good Thing* (Letter to the Editor), New York Times (November 20, 2003) Tom Scully, *The Right Prescription for Medicare* (Letter to the Editor), Chicago Tribune (Nov. 23, 2003).

[7] Public Law 108-173, Section 801(e).

*** RECEIVED ***
Feb 03,2004 14:06:34 WS# 06
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(4) The final legislation signed by the President on December 8, 2003.

In addition, we are requesting the CMS Actuaries' analysis of the legislation's impact on the projected solvency dates of the Medicare Hospital Insurance Trust Fund and the actuaries' analysis comparing the payments to various private plans relative to Medicare.

Given the significance of this matter, we request that you provide these cost estimates to our offices by February 17, 2003.

Sincerely,

Henry A. Waxman
Ranking Minority Member
Committee on Government Reform

John D. Dingell
Ranking Minority Member
Committee on Energy and Commerce

Charles B. Rangel
Ranking Minority Member
Committee on Ways and Means

**February 5, 2004**

**To: Centers for Medicare & Medicaid Services Administrator, Dennis Smith**

**From: Chief Actuary for the Health Care Financing Administration, Richard S. Foster**

**RE: Summary of Differences Between OACT and CBO Cost Estimates for P.L. 108-173 the "Medicare Prescription Drug, Improvement, and Modernization Act of 2003"**

February 5, 2004

NOTE TO: Dennis Smith

SUBJECT: Summary of Differences Between OACT and CBO Cost Estimates for P.L. 108-173, the "Medicare Prescription Drug, Improvement, and Modernization Act of 2003"—Updated

As you know, the Office of the Actuary has estimated that the Medicare modernization act would increase net Federal costs by a total of $534 billion through fiscal year 2013.[1] The corresponding estimate by the Congressional Budget Office is $395 billion. OACT and CBO have independently estimated the cost of the modernization act using the best data, assumptions, and methods that each organization could develop. The following points summarize the nature of the differences in the estimates.

- The estimates differ principally because the future is uncertain, and this uncertainty is reflected in somewhat different assumptions regarding the numerous cost and behavioral factors that will affect actual future costs. In this regard, the difference in estimates is a useful reminder of the inherent uncertainty and a rough indication of the sensitivity of future costs to the underlying cost factors.

- Of the total difference of $139 billion between the estimates, approximately $100 billion relates to Title I of the act, the Medicare prescription drug program:

  — OACT estimates that about 94 percent of all Medicare beneficiaries would enroll in (or otherwise benefit from) the Medicare drug benefit,[2] compared to 87 percent for CBO, and we also estimate a slightly higher average, per-beneficiary value for the standard drug benefit. These factors account for $32 billion of the total difference.

  — While OACT and CBO estimate similar numbers of beneficiaries who are eligible for the low-income drug subsidy, OACT estimates a significantly higher enrollment rate by these individuals. In addition, our estimated average cost for the low-income subsidy per beneficiary is slightly greater than CBO's. Of the total difference in estimated drug costs, the low-income subsidy accounts for $47 billion.

  — The cost to Medicare of providing the drug benefit would be partially offset by net Federal savings for Medicaid. (Federal Medicaid drug expenditures would be eliminated, but other Federal Medicaid costs would increase somewhat; as beneficiaries enroll for the Medicare low-income drug subsidy, some will be found to qualify for Medicaid coverage). CBO estimates a greater degree of net Federal Medicaid savings, because their prior baseline projections included a rapidly growing cost for "pharmacy plus" Medicaid waivers. In total, the CBO savings estimate is $18 billion greater than OACT's.

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[1] This estimate excludes Federal administrative costs, other than the $1.5 billion authorized by section 1015 of the act, and the impact on social insurance payroll taxes and general income taxes. An additional Medicare expenditure of $16 billion through 2013 would be made for employer drug subsidy payments to Federal employers.

[2] Beneficiaries in employer-sponsored retiree health benefit programs are included in this percentage.

- $32 billion of the remaining difference in the overall cost estimates is associated with Title II, the Medicare Advantage program. OACT's estimated costs for this title are $46 billion, versus CBO's estimate of $14 billion:

  — CBO's estimate is based on a $10 billion cost for the regional PPO stabilization fund, and $4 billion for the "immediate improvements" in 2004 and later MA payment rates. They estimate that these changes will slow the decline in private plan enrollment, with about 9 percent of beneficiaries ultimately so enrolled. Regional PPOs are estimated to have costs somewhat in excess of the prevailing "payment benchmarks," with the result that few such plans could participate and beneficiary enrollment would be minimal.

  — OACT's estimate includes $12 billion for the stabilization fund and another $34 billion due to the higher payment rates starting in 2004 and the restructured payment formula in 2006 and later. We estimate that HMO enrollment would increase from its current level of about 12 percent to 16 percent and that PPO enrollment would also reach 16 percent in 2009 and later. The latter projection is based on estimated PPO costs that are generally below the payment benchmarks, with the result that beneficiaries could qualify for significant premium rebates and/or additional benefits. Because these estimated PPO costs typically exceed fee-for-service levels, however, Medicare costs for such enrollees would be higher than under prior law.

- Other differences exist between the OACT and CBO estimates for Titles III through IX. These differences tend to be smaller and are also largely offsetting (with CBO sometimes higher and sometimes lower than our estimates).

As you know, it is not uncommon for these two organizations to differ somewhat in their estimates. For example, CBO's estimated Medicare savings for the Balanced Budget Act of 1997 totaled about $116 billion in the first 5 fiscal years. The corresponding OACT estimates were $152 billion. Similarly, the BBA savings estimates over the first 10 years were $394 billion for CBO versus $517 billion for OACT. I believe that CBO has prepared competent, good-faith estimates for the Medicare modernization act. I prefer the assumptions and methods employed in the Office of the Actuary, and stand behind our own estimates, while recognizing that an uncertain future could prove all of us wrong.

Please let us know if you have any questions about this information.

Rick Foster

March 16, 2004

From: Senator Chuck Hagel

To: Secretary of Health and Human Services, Tommy Thompson

RE: Chief Actuary for the Health Care Financing Administration, Richard S. Foster's Accusations of Suppressed Medicare Medicaid cost Figures

CHUCK HAGEL
NEBRASKA

248 RUSSELL SENATE OFFICE BUILDING
(202) 224-4224
(202) 224-9083 TTY/TDD

# United States Senate

WASHINGTON, DC 20510-2705

FOREIGN RELATIONS
CHAIR, SUBCOMMITTEE ON INTERNATIONAL ECONOMIC POLICY, EXPORT AND TRADE PROMOTION

BANKING, HOUSING, AND URBAN AFFAIRS
CHAIR, SUBCOMMITTEE ON INTERNATIONAL TRADE AND FINANCE

SELECT COMMITTEE ON INTELLIGENCE

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March 16, 2004

RECEIVED
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COMMUNICATIONS
CONTROL CENTER

The Honorable Tommy Thompson
Secretary of Health and Human Services
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Secretary Thompson:

As you know, there have been recent allegations regarding a cost analysis by Richard Foster, the Chief Actuary of the Centers for Medicare and Medicaid Services (CMS). I understand that he has claimed in media accounts that his cost estimates showing higher cost figures than were announced by the Bush Administration were intentionally suppressed during last year's Medicare debate, and that he was threatened with termination if he revealed the higher cost figures to Congress.

While I am not surprised that the estimated cost of the new bill far exceeds official CBO figures, I am very concerned about these allegations and the possible threats against Mr. Foster.

Concerns about the cost of the bill were raised repeatedly during the Medicare debate. If your agency possessed higher cost estimates, those estimates should have been disclosed for full discussion and debate. Estimates by the CMS Chief Actuary are not binding on Congress, but the figures would have been helpful during the debate and should have been released.

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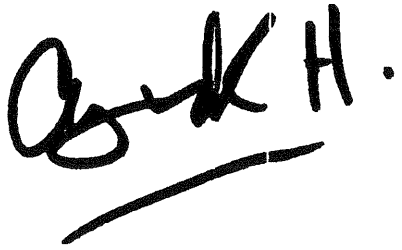
115 RAILWAY STREET
SUITE C102
SCOTTSBLUFF, NE 69361
(308) 632-6032

chuck_hagel@hagel.senate.gov

I would like to know if Members of Congress requested cost estimates from the Chief Actuary for the Medicare bill, and whether those requests were addressed. If the requests were not answered, why not? And what do you know about the threat of termination and withholding information from Congress that is alleged by Mr. Foster?

I look forward to your earliest response. Thank you.

Sincerely,



**March 30, 2004**

**From: Condoleezza Rice**
**To: National Commission on Terrorist Attacks Upon the United States**

**RE: President Bush appearing before the committee**

THE WHITE HOUSE

WASHINGTON

March 30, 2004

Thomas H. Kean, Chairman
Lee H. Hamilton, Vice Chairman
National Commission on Terrorist Attacks Upon the United States
2100 K St. N.W.
Washington, D.C. 20037

Dear Chairman Kean and Vice Chairman Hamilton:

As we discussed last night, the President is prepared, subject to the conditions set forth below, to agree to the request of the National Commission on Terrorist Attacks Upon the United States for public testimony, under oath, by the Assistant to the President for National Security Affairs, Dr. Condoleezza Rice.

The President has consistently stated a policy of strong support for the Commission and instructed the Executive Branch to provide unprecedented and extraordinary access to the Commission. To my knowledge, the Executive Branch has provided access to documents or information in response to each of the requests issued by the Commission to date, including many highly classified and extremely sensitive documents that have seldom, if ever, been made available outside the Executive Branch.

As an additional accommodation, the Executive Office of the President has made available more than 20 EOP officials, including the National Security Advisor, for private meetings with the Commission. As you know, based on principles underlying the Constitutional separation of powers, Presidents of both parties have long taken the position that White House advisors and staff are not subject to the jurisdiction of legislative bodies and do not provide testimony – even on a voluntary basis – on policy matters discussed within the White House or advice given to the President. Indeed, I am not aware of any instance of a *sitting* National Security Advisor testifying in public to a legislative body (such as the Commission) concerning policy matters.

We continue to believe, as I advised you by letter dated March 25, 2004, that the principles underlying the Constitutional separation of powers counsel strongly against such public testimony, and that Dr. Rice's testimony before the Commission can occur only with recognition that the events of September 11, 2001 present the most extraordinary and unique circumstances, and with conditions and assurances designed to limit harm to the ability of future Presidents to receive candid advice.

Nevertheless, the President recognizes the truly unique and extraordinary circumstances underlying the Commission's responsibility to prepare a detailed report on the facts and circumstances of the horrific attacks on September 11, 2001. Furthermore, we have now received assurances from the Speaker of the House and the Majority Leader of the Senate that, in their view, Dr. Rice's public testimony in connection with the extraordinary events of September 11, 2001 does not set, and should not be cited as, a precedent for future requests for a National Security Advisor or any other White House official to testify before a legislative body. In light

of the unique nature of the Commission and these additional assurances, the President has determined that, although he retains the legal authority to decline to make Dr. Rice available to testify in public, he will agree, as a matter of comity and subject to the conditions set forth below, to the Commission's request for Dr. Rice to testify publicly regarding matters within the Commission's statutory mandate.

The necessary conditions are as follows. First, the Commission must agree in writing that Dr. Rice's testimony before the Commission does not set any precedent for future Commission requests, or requests in any other context, for testimony by a National Security Advisor or any other White House official.

Second, the Commission must agree in writing that it will not request additional public testimony from any White House official, including Dr. Rice. The National Security Advisor is uniquely situated to provide the Commission with information necessary to fulfill its statutory mandate. Indeed, it is for this reason that Dr. Rice privately met with the Commission for more than four hours on February 7, fully answered every question posed to her, and offered additional private meetings as necessary. Despite the fact that the Commission will therefore have access to all information of which Dr. Rice is aware, the Commission has nevertheless urged that public confidence in the work of the Commission would be enhanced by Dr. Rice appearing publicly before the Commission. Other White House officials with information relevant to the Commission's inquiry do not come within the scope of the Commission's rationale for seeking public testimony from Dr. Rice. These officials will continue to provide the Commission with information through private meetings, briefings, and documents, consistent with our previous practice.

I greatly appreciate the strong support you expressed to me last night for an agreement to the conditions on which we are proposing this extraordinary accommodation and your commitment to strongly advocate for the full support of the Commission. If the Commission accepts the terms of this agreement, I hope that we can schedule a time as soon as possible for such a public appearance by Dr. Rice. I want to reiterate once again, however, that Dr. Rice would be made available to the Commission with due regard for the Constitutional separation of powers and reserving all legal authorities, privileges, and objections that may apply, including with respect to other governmental entities or private parties.

I would also like to take this occasion to offer an accommodation on another issue on which we have not yet reached an agreement – Commission access to the President and Vice President. I am authorized to advise you that the President and Vice President have agreed to one joint private session with all 10 Commissioners, with one Commission staff member present to take notes of the session.

I look forward to continuing to work with the Commission to help it obtain the information it needs to fulfill its statutory mandate.

Sincerely,

Alberto R. Gonzales
Counsel to the President

April 16, 2003

Department of Defense Memorandum

From: Secretary of Defense Donald Rumsfeld
To: Head of the U.S. Southern Command

Re: Approved interrogation methods for use on detainees at Guantanamo Bay.

UNCLASSIFIED
~~SECRET//NOFORN~~

THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

APR 16 2003

MEMORANDUM FOR THE COMMANDER, US SOUTHERN COMMAND

SUBJECT: Counter-Resistance Techniques in the War on Terrorism (S)

(U) ~~(S/NF)~~ I have considered the report of the Working Group that I directed be established on January 15, 2003.

(U) ~~(S/NF)~~ I approve the use of specified counter-resistance techniques, subject to the following:

(U) a. The techniques I authorize are those lettered A-X, set out at Tab A.

(U) b. These techniques must be used with all the safeguards described at Tab B.

(U) ~~(S)~~ c. Use of these techniques is limited to interrogations of unlawful combatants held at Guantanamo Bay, Cuba.

(U) ~~(S)~~ d. Prior to the use of these techniques, the Chairman of the Working Group on Detainee Interrogations in the Global War on Terrorism must brief you and your staff.

(U) ~~(S/NF)~~ I reiterate that US Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions. In addition, if you intend to use techniques B, I, O, or X, you must specifically determine that military necessity requires its use and notify me in advance.

(U) ~~(S/NF)~~ If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.

(U) ~~(S)~~ Nothing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees.

Attachments:
As stated



Declassified Under Authority of Executive Order 12958
Executive Secretary, Office of the Secretary of Defense
William P. Marriott, CAPT, USN
June 18, 2004

NOT Rreleasable TO
FOREIGN NATIONALS

UNCLASSIFIED

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013

TAB A

## INTERROGATION TECHNIQUES

(U) ~~(S//NF)~~ The use of techniques A - X is subject to the general safeguards as provided below as well as specific implementation guidelines to be provided by the appropriate authority. Specific implementation guidance with respect to techniques A - Q is provided in Army Field Manual 34-52. Further implementation guidance with respect to techniques R - X will need to be developed by the appropriate authority.

(U) ~~(S//NF)~~ Of the techniques set forth below, the policy aspects of certain techniques should be considered to the extent those policy aspects reflect the views of other major U.S. partner nations. Where applicable, the description of the technique is annotated to include a summary of the policy issues that should be considered before application of the technique.

A. (U) ~~(S//NF)~~ Direct: Asking straightforward questions.

B. (U) ~~(S//NF)~~ Incentive/Removal of Incentive: Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees. [Caution: Other nations that believe that detainees are entitled to POW protections may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34). Although the provisions of the Geneva Convention are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

C. (U) ~~(S//NF)~~ Emotional Love: Playing on the love a detainee has for an individual or group.

D. (U) ~~(S//NF)~~ Emotional Hate: Playing on the hatred a detainee has for an individual or group.

E. (U) ~~(S//NF)~~ Fear Up Harsh: Significantly increasing the fear level in a detainee.

F. (U) ~~(S//NF)~~ Fear Up Mild: Moderately increasing the fear level in a detainee.

G. (U) ~~(S//NF)~~ Reduced Fear: Reducing the fear level in a detainee.

H. (U) ~~(S//NF)~~ Pride and Ego Up: Boosting the ego of a detainee.

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Reason: 1.5(a)
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I. (U) ~~(S//NF)~~ Pride and Ego Down: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW. [Caution: Article 17 of Geneva III provides, "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." Other nations that believe that detainees are entitled to POW protections may consider this technique inconsistent with the provisions of Geneva. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

J. (U) ~~(S//NF)~~ Futility: Invoking the feeling of futility of a detainee.

K. (U) ~~(S//NF)~~ We Know All: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

L. (U) ~~(S//NF)~~ Establish Your Identity: Convincing the detainee that the interrogator has mistaken the detainee for someone else.

M. (U) ~~(S//NF)~~ Repetition Approach: Continuously repeating the same question to the detainee within interrogation periods of normal duration.

N. (U) ~~(S//NF)~~ File and Dossier: Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.

O. (U) ~~(S//NF)~~ Mutt and Jeff: A team consisting of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique. [Caution: Other nations that believe that POW protections apply to detainees may view this technique as inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

P. (U) ~~(S//NF)~~ Rapid Fire: Questioning in rapid succession without allowing detainee to answer.

Q. (U) ~~(S//NF)~~ Silence: Staring at the detainee to encourage discomfort.

R. (U) ~~(S//NF)~~ Change of Scenery Up: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

S. (U) ~~(S//NF)~~ Change of Scenery Down: Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

T. (U) ~~(S//NF)~~ Dietary Manipulation: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.

(U)
U. (~~S//NF~~) Environmental Manipulation: Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times. [Caution: Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane. Consideration of these views should be given prior to use of this technique.]

(U)
V. (~~S//NF~~) Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

(U)
W. (~~S//NF~~) False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him.

(U)
X. (~~S//NF~~) Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment. [Caution: The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command. This technique is not known to have been generally used for interrogation purposes for longer than 30 days. Those nations that believe detainees are subject to POW protections may view use of this technique as inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion and Article 126 which ensures access and basic standards of treatment. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

TAB B

**GENERAL SAFEGUARDS**

(U) ~~(S//NF)~~ Application of these interrogation techniques is subject to the following general safeguards: (i) limited to use only at strategic interrogation facilities; (ii) there is a good basis to believe that the detainee possesses critical intelligence; (iii) the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); (iv) interrogators are specifically trained for the technique(s); (v) a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) has been developed; (vi) there is appropriate supervision; and, (vii) there is appropriate specified senior approval for use with any specific detainee (after considering the foregoing and receiving legal advice).

(U) The purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators. Operating instructions must be developed based on command policies to insure uniform, careful, and safe application of any interrogations of detainees.

(U) ~~(S//NF)~~ Interrogations must always be planned, deliberate actions that take into account numerous, often interlocking factors such as a detainee's current and past performance in both detention and interrogation, a detainee's emotional and physical strengths and weaknesses, an assessment of possible approaches that may work on a certain detainee in an effort to gain the trust of the detainee, strengths and weaknesses of interrogators, and augmentation by other personnel for a certain detainee based on other factors.

(U) ~~(S//NF)~~ Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals. The policies established by the detaining units that pertain to searching, silencing, and segregating also play a role in the interrogation of a detainee. Detainee interrogation involves developing a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration of interrogation techniques and oversight is essential.

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013

(U) ~~(S//NF)~~ It is important that interrogators be provided reasonable latitude to vary techniques depending on the detainee's culture, strengths, weaknesses, environment, extent of training in resistance techniques as well as the urgency of obtaining information that the detainee is known to have.

(U) ~~(S//NF)~~ While techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques to be employed must be considered before any decisions are made regarding approval for particular situations. The title of a particular technique is not always fully descriptive of a particular technique. With respect to the employment of any techniques involving physical contact, stress or that could produce physical pain or harm, a detailed explanation of that technique must be provided to the decision authority prior to any decision.

Time permitting, each interrogator should unobtrusively observe the source to personally confirm his identity and to check his personal appearance and behavior.

After the interrogator has collected all information available about his assigned source, he analyzes it. He looks for indicators of psychological or physical weakness that might make the source susceptible to one or more approaches, which facilitates his approach strategy. He also uses the information he collected to identify the type and level of knowledge possessed by the source pertinent to the element's collection mission.

The interrogator uses his estimate of the type and extent of knowledge possessed by the source to modify the basic topical sequence of questioning. He selects only those topics in which he believes the source has pertinent knowledge. In this way, the interrogator refines his element's overall objective into a set of specific interrogation subjects.

The major topics that can be covered in an interrogation are shown below in their normal sequence. However, the interrogator is free to modify this sequence as necessary.

- Missions.
- Composition.
- Weapons, equipment, strength.
- Dispositions.
- Tactics.
- Training.
- Combat effectiveness.
- Logistics.
- Electronic technical data.
- Miscellaneous.

As a result of the planning and preparation phase, the interrogator develops a plan for conducting his assigned interrogation. He must review this plan with the senior interrogator, when possible. Whether written or oral, the interrogation plan must contain at least the following items:

- Interrogation objective.
- EPW's or detainee's identity, to include visual observation of the EPW or detainee by the interrogator.
- Interrogation time and place.
- Primary and alternate approaches.
- Questioning techniques to be used or why the interrogator selected only specific topics from the basic questioning sequence.
- Means of recording and reporting information obtained.

The senior interrogator reviews each plan and makes any changes he feels necessary based on the commander's PIR and IR. After the plan is approved, the holding compound is notified when to bring the source to the interrogation site. The interrogator collects all available interrogation aids needed (maps, charts, writing tools, and reference materials) and proceeds to the interrogation site.

## APPROACH PHASE

The approach phase begins with initial contact between the EPW or detainee and interrogator. Extreme care is required since the success of the interrogation hinges, to a large degree, on the early development of the EPW's or detainee's willingness to communicate. The interrogator's objective during this phase is to establish EPW or detainee rapport, and to gain his willing cooperation so he will correctly answer pertinent questions to follow. The interrogator—

- Adopts an appropriate attitude based on EPW or detainee appraisal.
- Prepares for an attitude change, if necessary.
- Begins to use an approach technique.

The amount of time spent on this phase will mostly depend on the probable quantity and value of information the EPW or detainee possesses, the availability of other EPW or detainee with knowledge on the same topics, and available time. At the initial contact, a businesslike relationship should be maintained. As the EPW or detainee assumes a cooperative attitude, a more relaxed atmosphere may be advantageous. The interrogator must carefully determine which of the various approach techniques to employ.

Regardless of the type of EPW or detainee and his outward personality, he does possess weaknesses which,

if recognized by the interrogator, can be exploited. These weaknesses are manifested in personality traits such as speech, mannerisms, facial expressions, physical movements, excessive perspiration, and other overt indications that vary from EPW or detainee.

From a psychological standpoint, the interrogator must be cognizant of the following behaviors. People tend to—

- Talk, especially after harrowing experiences.
- Show deference when confronted by superior authority.
- Rationalize acts about which they feel guilty.
- Fail to apply or remember lessons they may have been taught regarding security if confronted with a disorganized or strange situation.
- Cooperate with those who have control over them.
- Attach less importance to a topic about which the interrogator demonstrates identical or related experience or knowledge.
- Appreciate flattery and exoneration from guilt.
- Resent having someone or something they respect belittled, especially by someone they dislike.
- Respond to kindness and understanding during trying circumstances.
- Cooperate readily when given material rewards such as extra food or luxury items for their personal comfort.

Interrogators do not "run" an approach by following a pattern or routine. Each interrogation is different, but all interrogation approaches have the following in common. They—

- Establish and maintain control over the source and interrogation.
- Establish and maintain rapport between the interrogator and source.
- Manipulate the source's emotions and weaknesses to gain his willing cooperation.

The successful application of approach techniques eventually induces the source to willingly provide accurate intelligence information to the interrogator. The term "willingly" refers to the source's answering the interrogator's questions, not necessarily his cooperation.

The source may or may not be aware he is providing the interrogator with information about enemy forces. Some approaches may be complete when the source begins to answer questions. Others may have to be constantly maintained or reinforced throughout the interrogation.

The techniques used in an approach can best be defined as a series of events, not just verbal conversation between the interrogator and the source. The exploitation of the source's emotion can be harsh or gentle in application. Some useful techniques used by interrogators are—

- Hand and body movements.
- Actual physical contact such as a hand on the shoulder for reassurance.
- Silence.

## RAPPORT POSTURES

There are two types of rapport postures determined during planning and preparation: stern and sympathetic.

In the stern posture, the interrogator keeps the EPW or detainee at attention. The aim is to make the EPW or detainee keenly aware of his helpless and inferior status. Interrogators use this posture with officers, NCOs, and security-conscious enlisted men.

In the sympathetic posture, the interrogator addresses the EPW or detainee in a friendly fashion, striving to put him at ease. This posture is commonly used in interrogating older or younger EPWs. EPWs may be frightened and confused. One variation of this posture is when the interrogator asks about the EPW's family. Few EPWs will hesitate to discuss their family.

Frightened persons, regardless of rank, will invariably talk in order to relieve tension once they hear a sympathetic voice in their own tongue. To put the EPW at ease, the interrogator may allow the EPW to sit down, offer a cigarette, ask whether or not he needs medical care, and otherwise show interest in his case.

There are many variations of these basic postures. Regardless of the one used, the interrogator must present a military appearance and show character and energy. The interrogator must control his temper at all times, except when a display is planned. The inter-

rogator must not waste time in pointless discussions or make promises he cannot keep; for example, the interrogator's granting political asylum.

When making promises in an effort to establish rapport, great care must be taken to prevent implying that rights guaranteed the EPW under international and US law will be withheld if the EPW refuses to cooperate.

Under no circumstances will the interrogator betray surprise at anything the EPW might say. Many EPWs will talk freely if they feel the information they are discussing is already known to the interrogator. If the interrogator acts surprised, the EPW may stop talking immediately.

The interrogator encourages any behavior that deepens rapport and increases the flow of communication. At the same time, the interrogator must discourage any behavior that has the opposite effect.

The interrogator must always be in control of the interrogation. If the EPW or detainee challenges this control, the interrogator must act quickly and firmly. Everything the interrogator says and does must be within the limits of the GPW, Article 17.

## DEVELOPING RAPPORT

Rapport must be maintained throughout the interrogation, not only in the approach phase. If the interrogator has established good rapport initially and then abandons the effort, the source would rightfully assume the interrogator cares less and less about him as the information is being obtained. If this occurs, rapport is lost and the source may cease answering questions. Rapport may be developed by—

- Asking about the circumstances of capture. By doing this, the interrogator can gain insight into the prisoner's actual state of mind and, more importantly, he can ascertain his possible breaking points.
- Asking background questions. After asking about the source's circumstances of capture, apparent interest can be built by asking about the source's family, civilian life, friends, likes, and dislikes. This is to develop rapport, but nonpertinent questions may open new avenues for the approach and help determine whether tentative approaches chosen in the planning and preparation phase will be effective. If these questions show that the tentative approaches chosen will not be effective, a flexible interrogator can shift the approach direction without the source being aware of the change.

Depending on the situation, and requests the source may have made, the interrogator also can use the following to develop rapport.

- Offer realistic incentives, such as—
  - —Immediate comfort items (coffee, cigarettes).
  - —Short-term (a meal, shower, send a letter home).
  - —Long-term (repatriation, political asylum).
- Feign experience similar to those of the source.
- Show concern for the source through the use of voice vitality and body language.
- Help the source to rationalize his guilt.
- Show kindness and understanding toward the source's predicament.
- Exonerate the source from guilt.
- Flatter the source.

After having established control and rapport, the interrogator continually assesses the source to see if the approaches—and later the questioning techniques—chosen in the planning and preparation phase will indeed work.

Approaches chosen in planning and preparation are tentative and based on the sometimes scanty information available from documents, guards, and personal observation. This may lead the interrogator to select approaches which may be totally incorrect for obtaining this source's willing cooperation. Thus, careful assessment of the source is critical to avoid wasting valuable time in the approach phase.

The questions can be mixed or separate. If, for example, the interrogator has tentatively chosen a "love of comrades" approach, he should ask the source questions like "How did you get along with your fellow squad members?" If the source answers they were all very close and worked well as a team, the interrogator can use this approach and be reasonably sure of its success.

However, if the source answers, "They all hated my guts and I couldn't stand any of them," the interrogator should abandon that approach and ask some quick, nonpertinent questions to give himself time to work out a new approach.

### Smooth Transitions

The interrogator must guide the conversation smoothly and logically, especially if he needs to move from one approach technique to another. "Poking and hoping" in the approach may alert the prisoner to ploys and will make the job more difficult.

Tie-ins to another approach can be made logically and smoothly by using transitional phrases. Logical tie-ins can be made by including simple sentences which connect the previously used approach with the basis for the next one.

Transitions can also be smoothly covered by leaving the unsuccessful approach and going back to nonpertinent questions. By using nonpertinent conversation, the interrogator can move the conversation in the desired direction and, as previously stated, sometimes can obtain leads and hints about the source's stresses or weaknesses or other approach strategies that may be more successful.

### Sincere and Convincing

If an interrogator is using argument and reason to get the source to cooperate, he must be convincing and appear sincere. All inferences of promises, situations, and arguments, or other invented material must be believable. What a source may or may not believe depends on the interrogator's knowledge, experience, and training. A good source assessment is the basis for the approach and vital to the success of the interrogation effort.

### Recognize the Breaking Point

Every source has a breaking point, but an interrogator never knows what it is until it has been reached. There are, however, some good indicators the source is near his breaking point or has already reached it. For example, if during the approach, the source leans forward with his facial expression indicating an interest in the proposal or is more hesitant in his argument, he is probably nearing the breaking point. The interrogator must be alert to recognize these signs.

Once the interrogator determines the source is breaking, he should interject a question pertinent to the objective of the interrogation. If the source answers it, the interrogator can move into the questioning phase. If the source does not answer or balks at answering it, the interrogator must realize the source was not as close to the breaking point as thought. In this case, the interrogator must continue with his approach, or switch to an alternate approach or questioning technique and continue to work until he feels the source is near breaking.

The interrogator can tell if the source has broken only by interjecting pertinent questions. This process must be followed until the EPW or detainee begins to answer pertinent questions. It is possible the EPW or detainee may cooperate for a while and then balk at answering further questions. If this occurs, the interrogator can reinforce the approaches that initially gained the source's cooperation or move into a different approach before returning to the questioning phase.

At this point, it is important to note the amount of time spent with a particular source depends on several factors:

- The battlefield situation.
- Expediency which the supported commander's PIR and IR requirements need to be answered.
- Source's willingness to talk.

The number of approaches used is limited only by the interrogator's skill. Almost any ruse or deception is usable as long as the provisions of the GPW, as outlined in Figure 1-4, are not violated.

An interrogator must not pass himself off as a medic, chaplain, or as a member of the Red Cross (Red Crescent or Red Lion). To every approach technique, there are literally hundreds of possible variations, each of which can be developed for a specific situation or source. The variations are limited only by the interrogator's personality, experience, ingenuity, and imagination.

## APPROACH COMBINATIONS

With the exception of the direct approach, no other approach is effective by itself. Interrogators use different approach techniques or combine them into a cohesive, logical technique. Smooth transitions, sincerity, logic, and conviction almost always make a strategy work. The lack of will undoubtedly dooms it to failure. Some examples of combinations are—

- Direct—futility—incentive.
- Direct—futility—love of comrades.
- Direct—fear-up (mild)—incentive.

The number of combinations are unlimited. Interrogators must carefully choose the approach strategy in the planning and preparation phase and listen carefully

to what the source is saying (verbally or nonverbally) for leads the strategy chosen will not work. When this occurs, the interrogator must adapt to approaches he believes will work in gaining the source's cooperation.

The approach techniques are not new nor are all the possible or acceptable techniques discussed below. Everything the interrogator says and does must be in concert with the GWS, GPW, GC, and UCMJ. The approaches which have proven effective are—

- Direct.
- Incentive.
- Emotional.
- Increased fear-up.
- Pride and ego.

### Direct Approach

The interrogator asks questions directly related to information sought, making no effort to conceal the interrogation's purpose. The direct approach, always the first to be attempted, is used on EPWs or detainees who the interrogator believes will cooperate.

This may occur when interrogating an EPW or detainee who has proven cooperative during initial screening or first interrogation. It may also be used on those with little or no security training. The direct approach works best on lower enlisted personnel, as they have little or no resistance training and have had minimal security training.

The direct approach is simple to use, and it is possible to obtain the maximum amount of information in the minimum amount of time. It is frequently employed at lower echelons when the tactical situation precludes selecting other techniques, and where the EPW's or detainee's mental state is one of confusion or extreme shock. Figure C-3 contains sample questions used in direct questioning.

The direct approach is the most effective. Statistics show in World War II, it was 90 percent effective. In Vietnam and OPERATIONS URGENT FURY, JUST CAUSE, and DESERT STORM, it was 95 percent effective.

### Incentive Approach

The incentive approach is based on the application of inferred discomfort upon an EPW or detainee who lacks willpower. The EPW or detainee may display fondness for certain luxury items such as candy, fruit, or cigarettes. This fondness provides the interrogator with a positive means of rewarding the EPW or detainee for cooperation and truthfulness, as he may give or withhold such comfort items at his discretion. Caution must be used when employing this technique because—

- Any pressure applied in this manner must not amount to a denial of basic human needs under any circumstances. [NOTE: Interrogators may not withhold a source's rights under the GPW, but they can withhold a source's privileges.] Granting incentives must not infringe on these rights, but they can be things to which the source is already entitled. This can be effective only if the source is unaware of his rights or privileges.
- The EPW or detainee might be tempted to provide false or inaccurate information to gain the desired luxury item or to stop the interrogation.

The GPW, Article 41, requires the posting of the convention contents in the EPW's own language. This is an MP responsibility.

Incentives must seem to be logical and possible. An interrogator must not promise anything that cannot be delivered. Interrogators do not make promises, but usually infer them while sidestepping guarantees.

For example, if an interrogator made a promise he could not keep and he or another interrogator had to talk with the source again, the source would not have any trust and would probably not cooperate. Instead of clearly promising a certain thing, such as political asylum, an interrogator will offer to do what he can to help achieve the source's desired goal; as long as the source cooperates.

As with developing rapport, the incentive approach can be broken down into two incentives. The determination rests on when the source expects to receive the incentive offered.

- Short term—received immediately; for example, letter home, seeing wounded buddies.
- Long term—received within a period of time; for example, political asylum.

### Emotional Approach

Through EPW or detainee observation, the interrogator can often identify dominant emotions which motivate. The motivating emotion may be greed, love, hate, revenge, or others. The interrogator employs ver-

bal and emotional ruses in applying pressure to the EPW's or detainee's dominant emotions.

One major advantage of this technique is it is versatile and allows the interrogator to use the same basic situation positively and negatively.

For example, this technique can be used on the EPW who has a great love for his unit and fellow soldiers. The interrogator may take advantage of this by telling the EPW that by providing pertinent information, he may shorten the war or battle in progress and save many of his comrades' lives, but his refusal to talk may cause their deaths. This places the burden on the EPW or detainee and may motivate him to seek relief through cooperation.

Conversely, this technique can also be used on the EPW or detainee who hates his unit because it withdrew and left him to be captured, or who feels he was unfairly treated in his unit. In such cases, the interrogator can point out that if the EPW cooperates and specifies the unit's location, the unit can be destroyed, thus giving the EPW an opportunity for revenge. The interrogator proceeds with this method in a very formal manner.

This approach is likely to be effective with the immature and timid EPW.

Emotional Love Approach. For the emotional love approach to be successful, the interrogator must focus on the anxiety felt by the source about the circumstances in which he finds himself. The interrogator must direct the love the source feels toward the appropriate object: family, homeland, or comrades. If the interrogator can show the source what the source himself can do to alter or improve his situation, the approach has a chance of success.

This approach usually involves some incentive such as communication with the source's family or a quicker end to the war to save his comrades' lives. A good interrogator will usually orchestrate some futility with an emotional love approach to hasten the source's reaching the breaking point.

Sincerity and conviction are critical in a successful attempt at an emotional love approach as the interrogator must show genuine concern for the source, and for the object at which the interrogator is directing the source's emotion.

If the interrogator ascertains the source has great love for his unit and fellow soldiers, the interrogator can effectively exploit the situation. This places a burden on the source and may motivate him to seek relief through cooperation with the interrogator.

Emotional Hate Approach. The emotional hate approach focuses on any genuine hate, or possibly a desire for revenge, the source may feel. The interrogator must ascertain exactly what it is the source may hate so the emotion can be exploited to override the source's rational side. The source may have negative feelings about his country's regime, immediate superiors, officers in general, or fellow soldiers.

This approach is usually most effective on members of racial or religious minorities who have suffered discrimination in military and civilian life. If a source feels he has been treated unfairly in his unit, the interrogator can point out that, if the source cooperates and divulges the location of that unit, the unit can be destroyed, thus affording the source revenge.

By using a conspiratorial tone of voice, the interrogator can enhance the value of this technique. Phrases, such as "You owe them no loyalty for the way they treated you," when used appropriately, can expedite the success of this technique.

Do not immediately begin to berate a certain facet of the source's background or life until your assessment indicates the source feels a negative emotion toward it.

The emotional hate approach can be used more effectively by drawing out the source's negative emotions with questions that elicit a thought-provoking response. For example, "Why do you think they allowed you to be captured?" or "Why do you think they left you to die?" Do not berate the source's forces or homeland unless certain negative emotions surface.

Many sources may have great love for their country, but may hate the regime in control. The emotional hate approach is most effective with the immature or timid source who may have no opportunity up to this point for revenge, or never had the courage to voice his feelings.

### Fear-Up Approach

The fear-up approach is the exploitation of a source's preexisting fear during the period of capture and interrogation. The approach works best with young, inexperienced sources, or sources who exhibit a greater than normal amount of fear or nervousness. A source's fear may be justified or unjustified. For example, a source who has committed a war crime may justifiably fear

prosecution and punishment. By contrast, a source who has been indoctrinated by enemy propaganda may unjustifiably fear that he will suffer torture or death in our hands if captured.

This approach has the greatest potential to violate the law of war. Great care must be taken to avoid threatening or coercing a source which is in violation of the GPW, Article 17.

It is critical the interrogator distinguish what the source fears in order to exploit that fear. The way in which the interrogator exploits the source's fear depends on whether the source's fear is justified or unjustified.

Fear-Up (Harsh). In this approach, the interrogator behaves in an overpowering manner with a loud and threatening voice. The interrogator may even feel the need to throw objects across the room to heighten the source's implanted feelings of fear. Great care must be taken when doing this so any actions would not violate the prohibition on coercion and threats contained in the GPW, Article 17.

This technique is to convince the source he does indeed have something to fear; that he has no option but to cooperate. A good interrogator will implant in the source's mind that the interrogator himself is not the object to be feared, but is a possible way out of the trap.

Use the confirmation of fear only on sources whose fear is justified. During this approach, confirm to the source that he does indeed have a legitimate fear. Then convince the source that you are the source's best or only hope in avoiding or mitigating the object of his fear, such as punishment for his crimes.

You must take great care to avoid promising actions that are not in your power to grant. For example, if the source has committed a war crime, inform the source that the crime has been reported to the appropriate authorities and that action is pending. Next inform the source that, if he cooperates and tells the truth, you will report that he cooperated and told the truth to the appropriate authorities. You may add that you will also report his lack of cooperation. You may not promise that the charges against him will be dismissed because you have no authority to dismiss the charges.

Fear-Up (Mild). This approach is better suited to the strong, confident type of interrogator; there is generally no need to raise the voice or resort to heavy-handed, table-banging.

For example, capture may be a result of coincidence—the soldier was caught on the wrong side of the border before hostilities actually commenced (he was armed, he could be a terrorist)—or as a result of his actions (he surrendered contrary to his military oath and is now a traitor to his country, and his forces will take care of the disciplinary action).

The fear-up (mild) approach must be credible. It usually involves some logical incentive.

In most cases, a loud voice is not necessary. The actual fear is increased by helping the source realize the unpleasant consequences the facts may cause and by presenting an alternative, which, of course, can be brought about by answering some simple questions.

The fear-up (harsh) approach is usually a dead end, and a wise interrogator may want to keep it in reserve as a trump card. After working to increase the source's fear, it would be difficult to convince him everything will be all right if the approach is not successful.

### Fear-Down Approach

This technique is nothing more than calming the source and convincing him he will be properly and humanely treated, or telling him the war for him is mercifully over and he need not go into combat again. When used with a soothing, calm tone of voice, this often creates rapport and usually nothing else is needed to get the source to cooperate.

While calming the source, it is a good idea to stay initially with nonpertinent conversation and to avoid the subject which has caused the source's fear. This works quickly in developing rapport and communication, as the source will readily respond to kindness.

When using this approach, it is important the interrogator relate to the source at his perspective level and not expect the source to come up to the interrogator's level.

If the EPW or detainee is so frightened he has withdrawn into a shell or regressed to a less threatening state of mind, the interrogator must break through to him. The interrogator can do this by putting himself on the same physical level as the source; this may require some physical contact. As the source relaxes and begins to respond to kindness, the interrogator can begin asking pertinent questions.

This approach technique may backfire if allowed to go too far. After convincing the source he has nothing

to fear, he may cease to be afraid and may feel secure enough to resist the interrogator's pertinent question. If this occurs, reverting to a harsher approach technique usually will bring the desired result quickly.

The fear-down approach works best if the source's fear is unjustified. During this approach, take specific actions to reduce the source's unjustified fear. For example, if the source believes that he will be abused while in your custody, make extra efforts to ensure that the source is well cared for, fed, and appropriately treated.

Once the source is convinced that he has no legitimate reason to fear you, he will be more inclined to cooperate. The interrogator is under no duty to reduce a source's unjustified fear. The only prohibition is that the interrogator may not say or do anything that directly or indirectly communicates to the source that he will be harmed unless he provides the requested information.

These applications of the fear approach may be combined to achieve the desired effect. For example, if a source has justified and unjustified fears, you may initially reduce the source's unfounded fears, then confirm his legitimate fears. Again, the source should be convinced the interrogator is his best or only hope in avoiding or mitigating the object of his fear.

### Pride and Ego Approach

The strategy of this approach is to trick the source into revealing desired information by goading or flattering him. It is effective with sources who have displayed weakness or feelings of inferiority. A real or imaginary deficiency voiced about the source, loyalty to his organization, or any other feature can provide a basis for this technique.

The interrogator accuses the source of weakness or implies he is unable to do a certain thing. This type of source is also prone to excuses and reasons why he did or did not do a certain thing, often shifting the blame to others. An example is opening the interrogation with the question, "Why did you surrender so easily when you could have escaped by crossing the nearby ford in the river?"

The source is likely to provide a basis for further questions or to reveal significant intelligence information if he attempts to explain his surrender in order to vindicate himself. He may give an answer such as, "No one could cross the ford because it is mined."

This technique can also be employed in another manner--by flattering the source into admitting certain information in order to gain credit. For example, while interrogating a suspected saboteur, the interrogator states: "This was a smooth operation. I have seen many previous attempts fail. I bet you planned this. Who else but a clever person like you would have planned it? When did you first decide to do the job?"

This technique is especially effective with the source who has been looked down upon by his superiors. The source has the opportunity to show someone he is intelligent.

A problem with the pride and ego approach is it relies on trickery. The source will eventually realize he has been tricked and may refuse to cooperate further. If this occurs, the interrogator can easily move into a fear-up approach and convince the source the questions he has already answered have committed him, and it would be useless to resist further.

The interrogator can mention it will be reported to the source's forces that he has cooperated fully with the enemy, will be considered a traitor, and has much to fear if he is returned to his forces.

This may even offer the interrogator the option to go into a love-of-family approach where the source must protect his family by preventing his forces from learning of his duplicity or collaboration. Telling the source you will not report that he talked or that he was a severe discipline problem is an incentive that may enhance the effectiveness of the approach.

Pride and Ego-Up Approach. This approach is most effective on sources with little or no intelligence, or on those who have been looked down upon for a long time. It is very effective on low-ranking enlisted personnel and junior grade officers, as it allows the source to finally show someone he does indeed have some "brains."

The source is constantly flattered into providing certain information in order to gain credit. The interrogator must take care to use a flattering somewhat-in-awe tone of voice, and speak highly of the source throughout this approach. This quickly produces positive feelings on the source's part, as he has probably been looking for this type of recognition all of his life.

The interrogator may blow things out of proportion using items from the source's background and making them seem noteworthy or important. As everyone is eager to hear praise, the source will eventually reveal

pertinent information to solicit more laudatory comments from the interrogator.

Effective targets for a successful pride and ego-up approach are usually the socially accepted reasons for flattery, such as appearance and good military bearing. The interrogator should closely watch the source's demeanor for indications the approach is working. Some indications to look for are—

- Raising of the head.
- A look of pride in the eyes.
- Swelling of the chest.
- Stiffening of the back.

Pride and Ego-Down Approach. This approach is based on attacking the source's sense of personal worth. Any source who shows any real or imagined inferiority or weakness about himself, loyalty to his organization, or captured under embarrassing circumstances, can be easily broken with this approach technique.

The objective is for the interrogator to pounce on the source's sense of pride by attacking his loyalty, intelligence, abilities, leadership qualities, slovenly appearance, or any other perceived weakness. This will usually goad the source into becoming defensive, and he will try to convince the interrogator he is wrong. In his attempt to redeem his pride, the source will usually involuntarily provide pertinent information in attempting to vindicate himself.

A source susceptible to this approach is also prone to make excuses and give reasons why he did or did not do a certain thing, often shifting the blame to others. If the interrogator uses a sarcastic, caustic tone of voice with appropriate expressions of distaste or disgust, the source will readily believe him. Possible targets for the pride and ego-down approach are the source's—

- Loyalty.
- Technical competence.
- Leadership abilities.
- Soldierly qualities.
- Appearance.

The pride and ego-down approach is also a dead end n that, if unsuccessful, it is difficult for the interrogator o recover and move to another approach and reestablish a different type of rapport without losing all credibility.

### Futility

In this approach, the interrogator convinces the source that resistance to questioning is futile. When employing this technique, the interrogator must have factual information. These facts are presented by the interrogator in a persuasive, logical manner. He should be aware of and able to exploit the source's psychological and moral weaknesses, as well as weaknesses inherent in his society.

The futility approach is effective when the interrogator can play on doubts that already exist in the source's mind. There are different variations of the futility approach. For example:

- Futility of the personal situation—"You are not finished here until you answer the questions."
- Futility in that "everyone talks sooner or later."
- Futility of the battlefield situation.
- Futility in the sense if the source does not mind talking about history, why should he mind talking about his missions, they are also history.

If the source's unit had run out of supplies (ammunition, food, or fuel), it would be somewhat easy to convince him all of his forces are having the same logistical problems. A soldier who has been ambushed may have doubts as to how he was attacked so suddenly. The interrogator should be able to talk him into believing that the interrogator's forces knew of the EPW's unit location, as well as many more units.

The interrogator might describe the source's frightening recollections of seeing death on the battlefield as an everyday occurrence for his forces. Factual or seemingly factual information must be presented in a persuasive, logical manner, and in a matter-of-fact tone of voice.

Making the situation appear hopeless allows the source to rationalize his actions, especially if that action is cooperating with the interrogator. When employing this technique, the interrogator must not only have factual information but also be aware of and exploit the source's psychological, moral, and sociological weaknesses.

Another way of using the futility approach is to blow things out of proportion. If the source's unit was low on, or had exhausted, all food supplies, he can be easily

led to believe all of his forces had run out of food. If the source is hinging on cooperating, it may aid the interrogation effort if he is told all the other source's have cooperated.

The futility approach must be orchestrated with other approach techniques (for example, love of comrades). A source who may want to help save his comrades' lives may be convinced the battlefield situation is hopeless and they will die without his assistance.

The futility approach is used to paint a bleak picture for the prisoner, but it is not effective in and of itself in gaining the source's cooperation.

### We Know All

This approach may be employed in conjunction with the "file and dossier" technique (discussed below) or by itself. If used alone, the interrogator must first become thoroughly familiar with available data concerning the source. To begin the interrogation, the interrogator asks questions based on this known data. When the source hesitates, refuses to answer, or provides an incorrect or incomplete reply, the interrogator provides the detailed answer.

When the source begins to give accurate and complete information, the interrogator interjects questions designed to gain the needed information. Questions to which answers are already known are also asked to test the source's truthfulness and to maintain the deception that the information is already known. By repeating this procedure, the interrogator convinces the source that resistance is useless as everything is already known.

After gaining the source's cooperation, the interrogator still tests the extent of cooperation by periodically using questions to which he has the answers; this is very necessary. If the interrogator does not challenge the source when he is lying, the source will know everything is not known, and he has been tricked. He may then provide incorrect answers to the interrogator's questions.

There are some inherent problems with the use of the "we know all" approach. The interrogator is required to prepare everything in detail, which is time consuming. He must commit much of the information to memory, as working from notes may show the limits of the information actually known.

### File and Dossier

The file and dossier approach is used when the interrogator prepares a dossier containing all available information obtained from documents concerning the source or his organization. Careful arrangement of the material within the file may give the illusion it contains more data than actually there. The file may be padded with extra paper, if necessary. Index tabs with titles such as education, employment, criminal record, military service, and others are particularly effective.

The interrogator confronts the source with the dossiers at the beginning of the interrogation and explains intelligence has provided a complete record of every significant happening in the source's life; therefore, it would be useless to resist. The interrogator may read a few selected bits of known data to further impress the source.

If the technique is successful, the source will be intimidated by the size of the file, conclude everything is known, and resign himself to complete cooperation. The success of this technique is largely dependent on the naivete of the source, volume of data on the subject, and skill of the interrogator in convincing the source.

### Establish Your Identity

This approach is especially adaptable to interrogation. The interrogator insists the source has been correctly identified as an infamous individual wanted by higher authorities on serious charges, and he is not the person he purports to be. In an effort to clear himself of this allegation, the source makes a genuine and detailed effort to establish or substantiate his true identity. In so doing, he may provide the interrogator with information and leads for further development.

The "establish your identity" approach was effective in Viet Nam with the Viet Cong and in OPERATIONS JUST CAUSE and DESERT STORM.

This approach can be used at tactical echelons. The interrogator must be aware if it is used in conjunction with the file and dossier approach, as it may exceed the tactical interrogator's preparation resources.

The interrogator should initially refuse to believe the source and insist he is the criminal wanted by the ambiguous higher authorities. This will force the source to give even more detailed information about his unit in order to convince the interrogator he is who he says he is. This approach works well when combined with the "futility" or "we know all" approach.

### Repetition

This approach is used to induce cooperation from a ostile source. In one variation of this approach, the in-errogator listens carefully to a source's answer to a uestion, and then repeats the question and answer everal times. He does this with each succeeding ques-ion until the source becomes so thoroughly bored with he procedure he answers questions fully and candidly to atisfy the interrogator and gain relief from the onotony of this method.

The repetition technique must be judiciously used, as will generally be ineffective when employed against troverted sources or those having great self-control. fact, it may provide an opportunity for a source to gain his composure and delay the interrogation. In is approach, the use of more than one interrogator or ape recorder has proven effective.

### Rapid Fire

This approach involves a psychological ploy based on the principles that—

- Everyone likes to be heard when he speaks.
- It is confusing to be interrupted in mid-sentence with an unrelated question.

This approach may be used by one or simultaneously two or more interrogators in questioning the same rce. In employing this technique, the interrogator s a series of questions in such a manner that the rce does not have time to answer a question com-tely before the next one is asked.

his confuses the source and he will tend to con-lict himself, as he has little time to formulate his wers. The interrogator then confronts the source the inconsistencies causing further contradictions.

many instances, the source will begin to talk freely an attempt to explain himself and deny the rrogator's claims of inconsistencies. In this attempt, source is likely to reveal more than he intends, thus ting additional leads for further exploitation. This oach may be orchestrated with the pride and ego-n or fear-up approaches.

Besides extensive preparation, this approach requires an experienced and competent interrogator, with comprehensive case knowledge and fluency in the source's language.

### Silent

This approach may be successful when used against the nervous or confident source. When employing this technique, the interrogator says nothing to the source, but looks him squarely in the eye, preferably with a slight smile on his face. It is important not to look away from the source but force him to break eye contact first.

The source may become nervous, begin to shift in his chair, cross and recross his legs, and look away. He may ask questions, but the interrogator should not answer until he is ready to break the silence. The source may blurt out questions such as, "Come on now, what do you want with me?"

When the interrogator is ready to break silence, he may do so with some nonchalant questions such as, "You planned this operation for a long time, didn't you? Was it your idea?" The interrogator must be patient when using this technique. It may appear the technique is not succeeding, but usually will when given a reasonable chance.

### Change of Scene

The idea in using this approach is to get the source away from the atmosphere of an interrogation room or setting. If the interrogator confronts a source who is apprehensive or frightened because of the interrogation environment, this technique may prove effective.

In some circumstances, the interrogator may be able to invite the source to a different setting for coffee and pleasant conversation. During the conversation in this more relaxed environment, the interrogator steers the conversation to the topic of interest. Through this somewhat indirect method, he attempts to elicit the desired information. The source may never realize he is being interrogated.

Another example in this approach is an interrogator poses as a compound guard and engages the source in conversation, thus eliciting the desired information.

## QUESTIONING PHASE

e interrogation effort has two primary goals: To n information and to report it. Developing and good questioning techniques enable the interrogator to obtain accurate and pertinent information by following a logical sequence.

May 11, 2004

National Security Presidential Directive

Subject: United States Government Operation in Iraq

THE WHITE HOUSE

WASHINGTON
May 11, 2004

NATIONAL SECURITY PRESIDENTIAL DIRECTIVE/NSPD

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF THE TREASURY
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
THE SECRETARY OF INTERIOR
THE SECRETARY OF AGRICULTURE
THE SECRETARY OF COMMERCE
THE SECRETARY OF LABOR
THE SECRETARY OF HEALTH & HUMAN SERVICES
THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT
THE SECRETARY OF TRANSPORTATION
THE SECRETARY OF ENERGY
THE SECRETARY OF EDUCATION
THE SECRETARY OF VETERAN AFFAIRS
THE SECRETARY OF HOMELAND SECURITY
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET
ASSISTANT TO THE PRESIDENT FOR
NATIONAL SECURITY AFFAIRS
ASSISTANT TO THE PRESIDENT FOR
ECONOMIC POLICY
DIRECTOR OF CENTRAL INTELLIGENCE
CHAIRMAN, JOINT CHIEFS OF STAFF

SUBJECT: United States Government Operations in Iraq.

We have seen a period of significant advancement in Iraq, as the yoke of Saddam Hussein's tyranny has been thrown off and democracy and economic reform have begun to take root. With the termination of the Coalition Provisional Authority (CPA) not later than June 30, 2004 and the re-establishment of diplomatic relations between the United States and a sovereign Iraqi government, our efforts in Iraq will take on new and formidable challenges that must be met successfully.

During these critical times, we must organize to advance these gains and establish and sustain a strong bilateral relationship. When the CPA is terminated, the United States will be represented in Iraq by a Chief of Mission, who on my behalf and under the guidance of the Secretary of State, shall be responsible for the direction, coordination and supervision of all United States Government employees, policies, and activities in country, except those under the command of an area military commander, and employees seconded to an International Organization.

Commander, USCENTCOM, under the authority, direction, and control of the Secretary of Defense, shall continue to be responsible for U.S. efforts with respect to security and military operations in Iraq. In all activities, the Chief of Mission and Commander, USCENTCOM shall ensure the closest cooperation and mutual support.

The Secretary of State shall be responsible for the continuous supervision and general direction of all assistance for Iraq. Commander, USCENTCOM, with the policy guidance of the Chief of Mission, shall direct all United States Government efforts and coordinate international efforts in support of organizing, equipping, and training all Iraqi security forces. At the appropriate time, the Secretary of State and the Secretary of Defense shall jointly decide when these functions shall transfer to a security assistance organization and other appropriate organizations under the authority of the Secretary of State and the Chief of Mission that will be staffed in accordance with NSDD-38 of June 2, 1982.

The U.S. Mission in Baghdad and an office in the Department of State will assume from the CPA those authorities and responsibilities that continue after CPA termination.

I establish, in accordance with Title 5, United States Code, section 3161, a temporary organization within the Department of State and, if the Secretary of State so designates, within the U.S. Mission in Baghdad, called the Iraq Reconstruction Management Office (IRMO) to facilitate the transition in Iraq. The IRMO will be headed by a Director selected by the Secretary of State, and its staff may include, as determined by the Secretary: (1) personnel with relevant expertise detailed on a non-reimbursable basis from other United States Government agencies; (2) senior and other technical advisors; (3) personnel from other Coalition partner governments; and (4) such other personnel as the Secretary may direct to support that effort.

~~The Secretary shall regularly evaluate the staffing requirements~~ of this organization.

I also establish, in accordance with Title 5, United States Code, section 3161, a temporary organization within the Department of Defense to be called the Project and Contracting Office (PCO) to provide acquisition and project management support with respect to activities in Iraq, as requested by the Secretary of State and heads of other Departments and agencies. The Secretary of Defense in consultation with the Secretary of State shall select a Director for PCO. PCO personnel in Iraq shall be permanently or temporarily assigned under Chief of Mission authority. PCO shall provide acquisition and project management support to the Chief of Mission. PCO's services may include engineering, auditing, and other contract-related services.

The effort to build a strong bilateral relationship with the Government of Iraq and support Iraq as it makes the transition to democracy must have the full commitment of all agencies. To accomplish our mission, I direct the heads of U.S. departments and agencies to provide, on a non-reimbursable basis, assistance, services and other support, to include security, medical, logistical and administrative support and details of personnel, with respect to U.S. activities in Iraq. To the maximum extent possible, the Secretary of State shall identify for the heads of relevant departments and agencies the expected requirements for non-reimbursable support for their use in preparing future budget requests. The Director of the Office of Management and Budget shall ensure that future budget submissions request the funding and authorities I determine necessary to support the U.S. Mission in Iraq.

This NSPD shall be effective immediately, shall constitute an Executive order solely for purposes of 5 U.S.C. 3161, and shall not be subject to Executive order 11030 of June 19, 1962, as amended. The CPA shall terminate not later than June 30, 2004. Upon the termination of the CPA, this NSPD supersedes NSPD-24, dated January 20, 2003.

June 22, 2004

White House Memorandum

RE: Interrogation techniques used at Camp X-Ray at Guantanamo Bay, Cuba (GTMO)

# GTMO Interrogation Techniques

**Approved by SECDEF in Dec 2002:**

- Category I
  - Incentive
  - Yelling at Detainee
  - Deception
  - Multiple Interrogator techniques
  - Interrogator identity
- Category II
  - Stress positions for a maximum of four hours (e.g., standing)
  - Use of falsified documents or reports
  - Isolation up to 30 days (requires notice)
  - Interrogation outside of the standard interrogation booth
  - Deprivation of light and auditory stimuli
  - Hooding during transport & interrogation
  - Use of 20 hour interrogations
  - Removal of all comfort items
  - Switching detainee from hot meal to MRE
  - Removal of clothing
  - Forced grooming (e.g., shaving)
  - Inducing stress by use of detainee's fears (e.g., dogs)
- Category III
  - Use of mild, non-injurious physical contact

**Used Dec 2002 through 15 Jan 2003:**

- Category I
  - Yelling (Not directly into ear)
  - Deception (Introducing of confederate detainee)
  - Role-playing interrogator in next cell
- Category II
  - Removal from social support at Camp Delta
  - Segregation in Navy Brig
  - Isolation in Camp X-Ray
  - Interrogating the detainee in an environment other than standard interrogation room at Camp Delta (i.e., Camp X-Ray)
  - Deprivation of light (use of red light)
  - Inducing stress (use of female interrogator)
  - Up to 20-hour interrogations
  - Removal of all comfort items, including religious items
  - Serving MRE instead of hot rations
  - Forced grooming (to include shaving facial hair and head – also served hygienic purposes)
  - Use of false documents or reports

6/22/2004

JUN-22-2004 11:30 DOD GENERAL COUNSEL
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